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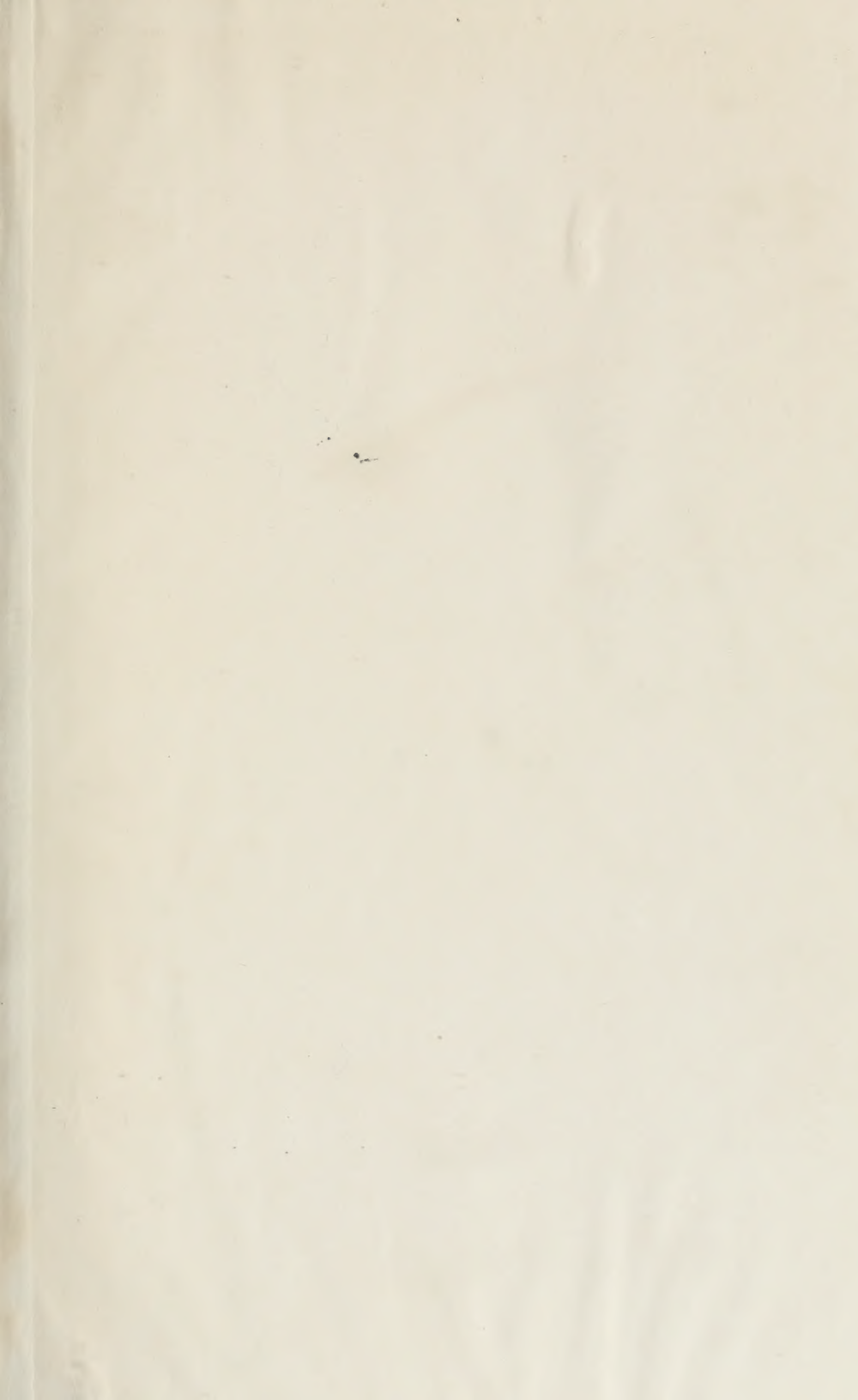
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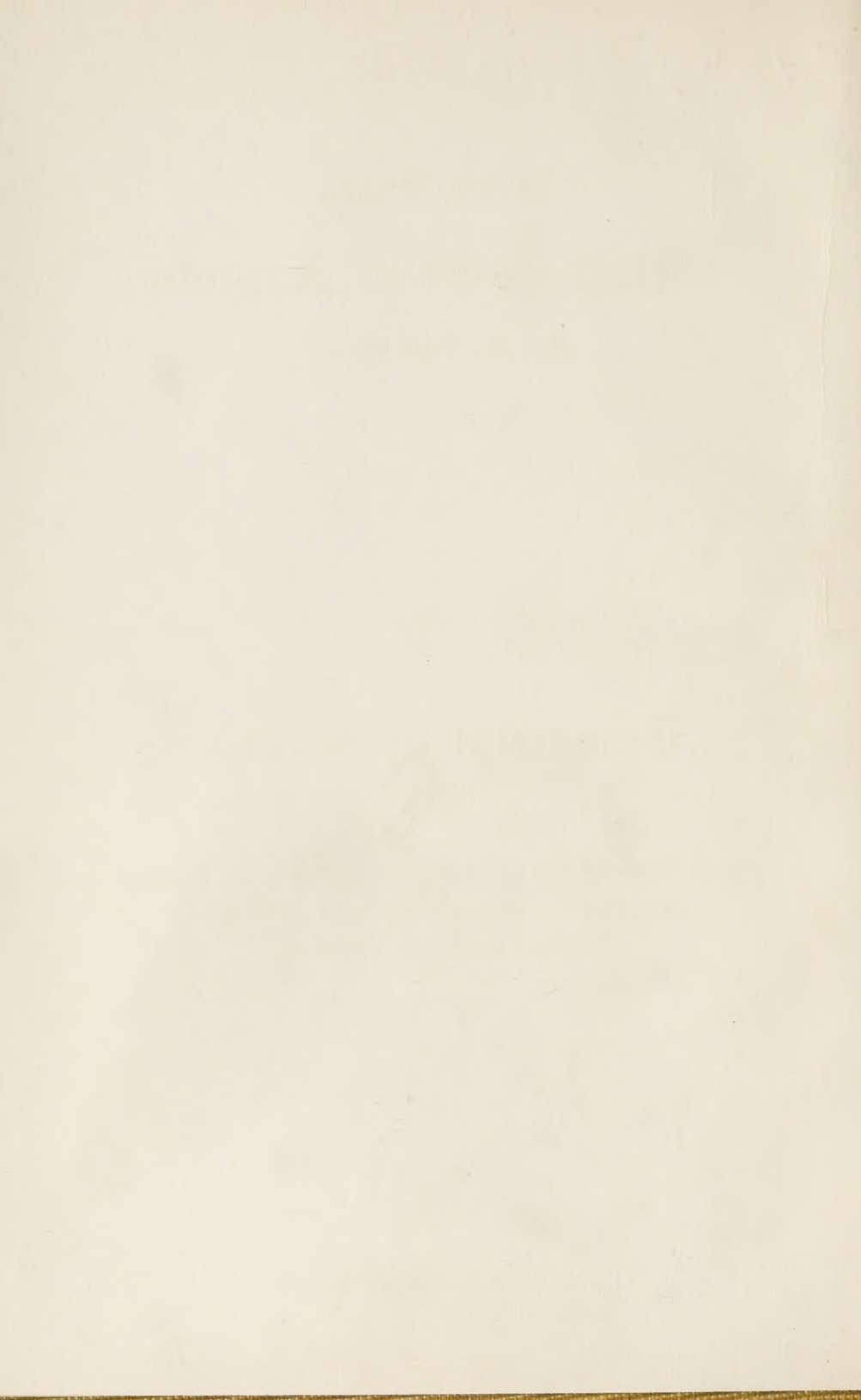
United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
OLAF O. HANA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the Western District of Wash-
ington, Northern Division.

FILED
AUG 24 1921
F. D. MONCKTON,
CLERK




United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
OLAF O. HANA,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

ROBERT C. SAUNDERS, Esq., United States District Attorney, Attorney for Plaintiff in Error,
310 Federal Building, Seattle, Washington.

CHARLOTTE KOLMITZ, Assistant United States District Attorney, Attorney for Plaintiff in Error,

310 Federal Building, Seattle, Washington.

IRA BRONSON, Esq., Attorney for Defendant in Error,

614 Colman Building, Seattle, Washington,

J. S. ROBINSON, Esq., Attorney for Defendant in Error,

614 Colman Building, Seattle, Washington,

H. B. JONES, Esq., Attorney for Defendant in Error,

614 Colman Building, Seattle, Washington,

[1*]

United States District Court, Western District of
Washington, Northern Division.

November Term, 1920.

No. 5853.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF O. HANA,

Defendant.

*Page-number appearing at foot of page of original certified Transcript of Record.

Complaint.

COMES now the United States of America, by Robert C. Saunders, United States Attorney for the Western District of Washington, and Charlotte Kolnitz, Assistant United States Attorney for said District, and for cause of action against the above-named defendant, Olaf O. Hana, respectfully shows the Court and alleges, as follows:

I.

That "H. B. Lovejoy" is a steamship of American register, plying in the trade between British Columbia in the Dominion of Canada, and the west coast of the United States.

II.

During the matters and times set forth in this complaint, Olaf O. Hana was, and is now, the master of the American steamship "H. B. Lovejoy."

III.

During the voyage complained of, the American steamship "H. B. Lovejoy" left the city of Vancouver, British Columbia, arriving at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on the 31st of January, 1921. [2]

IV.

On the voyage heretofore mentioned, the said American steamship "H. B. Lovejoy" was in ballast.

V.

After arrival within the waters of the United States and within this district and division, the said

defendant, Olaf O. Hana, as master as aforesaid of the said American steamship "H. B. Lovejoy," filed with the Collector of Customs of the United States at the port of Seattle, Washington, certain manifests and store lists which were then and there claimed and represented by said master and purported to be true, and correct manifests and store lists of all merchandise at that time on board said steamship. Thereafter, at the port of Seattle, the customs officers of the United States found upon said steamship the following described merchandise of the following value, to wit:

24 quart bottles of whiskey,

2½ pint bottles of beer, and

1 quart bottle of wine, total value . . . \$73.50,
making a total valuation of said merchandise in the sum of seventy-three and 50/100 dollars (\$73.50); that said merchandise and no part thereof was shown, included or described in the said manifests or store lists, or in any of them.

VI.

The said merchandise referred to and described in paragraph V hereof was brought into the United States in the said steamship "H. B. Lovejoy," from a foreign port, to wit, the port of Vancouver, in the Province of British Columbia, Dominion of Canada, and was not included or described in any manifest or store list hereinabove referred to and for which said merchandise [3] there was no manifest or store list on board said steamship agreeing therewith.

VII.

A complaint having been made to the Collector of Customs of the United States at the port of Seattle, Washington, by the Inspector discovering the merchandise hereinabove described, upon due notice the said Collector of Customs heretofore, on, to wit, the 31st day of January, 1921, assessed against and imposed upon the said defendant, Olaf O. Hana, master of the said American steamship "H. B. Lovejoy," a penalty equal to the value of such merchandise, that is to say, a penalty in the sum of Seventy-three Dollars and Fifty Cents (\$73.50).

VIII.

That the said defendant has failed and refused and does fail and refuse to pay said sum of Seventy-three and 50/100 Dollars (\$73.50) imposed and assessed as a penalty as aforesaid, although demand therefor has heretofore been made by the said Collector of Customs.

IX.

That by reason of the matters and facts herein set forth, the said defendant Olaf O. Hana is liable to the United States of America to a penalty in the sum of Seventy-three and 50/100 Dollars (\$73.50).

WHEREFORE, plaintiff prays that it do have and recover of and from the said defendant the said sum of Seventy-three and 50/100 (\$73.50), together with all of its statutory and [4] other costs and expenses incurred in this action.

ROBT. C. SAUNDERS,

United States Attorney.

CHARLOTTE KOLMITZ,

Assistant United States Attorney.

United States of America,
Western District of Washington,
Northern Division,—ss.

Charlotte Kolmitz, being first duly sworn, on her oath deposes and says: That she is Assistant United States Attorney for the Western District of Washington; that she has read the foregoing complaint, knows the contents thereof, and that the same is true as she verily believes.

CHARLOTTE KOLMITZ.

Subscribed and sworn to before me this 7th day of February, A. D. 1921.

[Seal U. S. District Court]

FRANK L. CROSBY, Jr.,
Deputy Clerk U. S. District Court, Western District
of Washington.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 7, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [5]

In the District Court of the United States for the
Western District of Washington, Northern Division.

No. 5853.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF O. HANA,

Defendant.

Demurrer.

The defendant demurs to the complaint in the above-entitled action on the ground that it does not state sufficient facts to constitute a cause of action against him.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant.

POINTS AND AUTHORITIES.

This action is apparently brought under Section 2809, R. S., which reads as follows:

“Sec. 2809. (PENALTY FOR FAILURE TO HAVE A CORRECT MANIFEST.) If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers or crew of such vessel, shall be forfeited.”

The point which we desire to raise is, that the alleged unmanifested articles, that is, whiskey, beer and wine, are not “merchandise” within the meaning and object of the above section.

It will be noted that the said section provides for forfeiture of the unmanifested merchandise.

But section 3074, R. S., provides in a mandatory way that all forfeited articles shall be appraised, and

section 3077, R. S., provides in an equally mandatory way that after notice all forfeited [6] articles shall be sold at public auction.

Therefore, the term "merchandise" used in Section 2809 cannot include articles which are wholly contraband, and which cannot be lawfully sold, else the Collector would be required by the Statutes to do an unlawful act.

It is our contention that the term merchandise means articles which are the subject of lawful traffic, and we note that this court has so held very recently, and has further held this with reference to analogous sections of the Customs statutes.

See The "Good Hope," 268 Fed. 694.

BRONSON, ROBINSON & JONES,

Attorneys for Defendant.

Due service of a copy hereof admitted this 18th day of February, 1921.

ROBERT C. SAUNDERS,

Atty. for U. S.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 18, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [7]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 5853.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF O. HANA,

Defendant.

Decision.

Feb. 25, 1921 (Filed).

It is alleged that the "H. B. Lovejoy," a steamship of American register entered the Port of Seattle from the City of Vancouver, B. C., and filed with the Collector of Customs what purported to be a manifest and store list of all merchandise at that time on board of the steamship. Thereafter the customs officer found on the steamship 24 quart bottles of whiskey, 2½ pint bottles of beer and one quart bottle of wine, total value \$73.50; that upon complaint and after due notice the Collector of Customs on January 31, 1921, assessed against the defendant, master of the steamship, a penalty equal to the value of the "merchandise," and that he has refused to pay and recovery is sought together with the costs. The defendant demurs to the complaint on the ground it does not state sufficient facts to constitute a cause of action.

ROBERT C. SAUNDERS, U. S. Atty., and CHARLOTTE KOLMITZ, Asst. U. S. Atty., Attorneys for Plaintiff.

BRONSON, ROBINSON & JONES, Attorneys for Defendant.

NETERER, District Judge.

The Government bases its action on Sec. 2809, Rev. Stat., and insists that beer and wine are “merchandise” within the meaning of this section. The defendant contends that the unmanifested articles, whiskey, beer and wine are not “merchandise”; that the articles are clearly contraband, and since under Sec. 2809, *supra*, not manifest they must be [8] forfeited and that all forfeited articles must be appraised, Sec. 3074, R. S., and after notice must be sold at public auction, Sec. 3077, R. S., and that this Court in *The Good Hope*, 268 Fed. 694, concluded this issue in his favor. It was there held that under the Prohibition Act, intoxicating liquor may be imported for nonbeverage purposes, but to have a legal status as merchandise, it must come into the United States in harmony with the provisions of the Prohibition Act, which requires as a prerequisite a permit from the Commissioner, and it was said at page 695:

“No permit having been issued, it could not be tendered at the Custom-house. It was contraband the instant it came into the United States, and the vessel carrying it was subject to forfeiture under Sec. 26, Act, *supra*.”

In order for an article to be called merchandise, it must be an object of trade and commerce. United

States vs. One Sorrel Horse, 27 Fed. Cases, 315. The classing of the wine, beer and whiskey as merchandise under the facts stated is out of harmony with the National Prohibition Act and all of the provisions of the revenue laws, which provide that property seized and forfeited shall be sold at public auction by the Collector. This manifestly could not be done, and as pointed out in *The Good Hope, supra*, there is other provision of statute which provides for penalizing just such attempted importation, and such provision is exclusive.

The demurrer is sustained.

NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 25, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [9]

United States District Court, Western District of
Washington, Northern Division.

No. 5853.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF O. HANA,

Defendant.

Petition for Reargument.

COMES now the plaintiff and respectfully petitions this Court for a reargument and reconsideration of defendant's demurrer for the reason and upon the ground that the Court in its memorandum decision filed February 25, 1921, sustained defendant's demurrer, basing its decision on the Goodhope case which in turn seems to have been based largely upon the opinion of the Circuit Court of Appeals in the case of *United States vs. One Ford Automobile*, 262 Fed. 374. Since the decision in the Goodhope case, the Circuit Court of Appeals for the Second Circuit has, to all intents and purposes, reversed itself, in the case of *Feathers of Wild Birds vs. United States*, 267 Fed. 964. Further, that the Court did not take into consideration the provisions of Section 27, Title II of the National Prohibition Act, which provides that a Court order may be taken for the sale of forfeited liquor to persons holding permits to purchase, the liquor thereupon becoming a legitimate article of commerce, in accordance with the provisions of the said National Prohibition Act and the regulations of the Commissioner of Internal Revenue.

ROBT. C. SAUNDERS,
United States Attorney,
CHARLOTTE KOLMITZ,
Assistant United States Attorney.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. May 26, 1921. F. M. Harshberger, Clerk.
By S. E. Leitch, Deputy. [10]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 5853.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF O. HANA,

Defendant.

Decision.

Filed June 6, 1921.

ROBERT C. SAUNDERS, U. S. Atty., and
CHARLOTTE KOLMITZ, Asst. U. S. Atty.,
Attorneys for Plaintiff.

BRONSON, ROBINSON & JONES, Attorneys for
Defendant.

NETERER, District Judge.

The petition for rehearing is denied. The Good Hope, 268 Fed. 694, is not modified by Feathers of Wild Birds vs. U. S., 267 Fed. 694, nor does this case modify the United States vs. One Ford Automobile, 262 Fed. 374, cited in the Good Hope. The Court in the "Feathers" case quotes from the "One Ford" case and says * * * "The statute is complete and it makes no reference to any other statute which could give rise to a right of action

for forfeiture of the vehicle of transportation and we cannot add to the punishment already inflicted upon Tourville, the forfeiture of his automobile.”

The Circuit Court of Appeals in this circuit in *United States vs. Sischo*, 270 Fed. 958, endorses what was said in *The Good Hope*.

NETERER,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 6, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

United States District Court, Western District of
Washington, Northern Division.

No. 5853.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF O. HANA,

Defendant.

Judgment.

BE IT REMEMBERED that this matter came on heretofore and on the 21st day of Feb., 1921, duly and regularly for hearing upon the demurrer of the defendant to the complaint of the plaintiff, the plaintiff appearing by Charlotte Kolmitz, Assistant United States Attorney for the Western District of Washington, and the defendant by his at-

torneys, Bronson, Robinson & Jones, and the matter being duly presented to the Court by the attorneys for the respective parties, and the Court having considered said demurrer and that said demurrer was well taken and should be sustained, directs that the demurrer so filed by the defendant to the complaint of the plaintiff be sustained.

And the plaintiff subsequent thereto having filed its petition for reargument and said petition having heretofore come on for hearing on the 26th day of May, 1921, duly and regularly, and the said Court having heard said petition denied the same.

And the plaintiff subsequent thereto having failed to amend its complaint or to present any further, other or additional applications for a reconsideration of the order so made by the Court sustaining said demurrer, and the plaintiff electing to stand upon its complaint and refusing to plead further.
[12]

NOW, THEN, upon motion of the defendant for judgment, it is by the Court ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing by reason of its alleged cause of action herein as against the defendant, and that this action as against the defendant be, and it is hereby, dismissed, and that the defendant go hence without day, to all of which the plaintiff has excepted and exception is allowed.

Done in open court this 14th day of July, 1921.

JEREMIAH NETERER,

Judge.

O. K. as to form.

BRONSON, ROBINSON & JONES,

Attys. for Deft.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 14, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

United States District Court, Western District of
Washington, Northern Division.

No. 5853.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF O. HANA,

Defendant.

Petition for Writ of Error.

Comes now the United States of America, plaintiff in the above-entitled cause, and feeling aggrieved by the final judgment herein entered on the 14th day of July, 1921, petitions this Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and according to the laws of the United States in that behalf made and provided, there to correct certain errors committed to the prejudice of the said plaintiff, which more in detail appear from the assignment of errors filed with this petition, and prays that a writ of error issue out of said Court

of Appeals, for the correction of the error so complained of, and that the transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to said Court of Appeals.

ROBERT C. SAUNDERS,

United States Attorney,

CHARLOTTE KOLMITZ,

Assistant United States Attorney,

Attorneys for Plaintiff.

O.K.—BRONSON, ROBINSON & JONES.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 14, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [14]

United States District Court, Western District of
Washington, Northern Division.

No. 5853.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF O. HANA,

Defendant.

Assignment of Errors.

Comes now the plaintiff, United States of America, by and through Robert C. Saunders, United States District Attorney, and files the following assignment of errors upon which he will rely upon his appeal from the judgment made by this Honor-

able Court on the 14th day of July, 1921, in the above-entitled cause.

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in sustaining the demurrer of the defendants to the complaint of the plaintiff herein.

II.

The said District Court erred in dismissing said action.

ROBERT C. SAUNDERS,
United States Attorney.

CHARLOTTE KOLMITZ,
Assistant United States Attorney.

Copy of above received.

BRONSON, ROBINSON & JONES,
For Deft.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 14, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [15]

United States District Court, Western District of
Washington, Northern Division.

No. 5853.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF O. HANA,

Defendant.

Order Allowing Writ of Error.

Comes the plaintiff, United States of America, by its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error on assignment of error intended to be urged, and praying also that a transcript of record and proceedings, upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings be had as may be proper in the premises. Now, on consideration thereof, the Court does hereby allow the writ of error prayed for.

Dated this 14th day of July, 1921.

JEREMIAH NETERER,
United States District Judge.

Copy of above received.

BRONSON, ROBINSON & JONES,
Attys. for Deft.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 14, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [16]

United States District Court, Western District of
Washington, Northern Division.

No. 5853.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF O. HANA,

Defendant.

**Admission of Service of Petition for Writ of Error,
etc.**

Due, timely and regular service, together with the receipt of copies thereof, of the plaintiff's petition for writ of error, or order allowing writ of error, and praecipe for transcript of record is hereby admitted this 13th day of July, 1921.

BRONSON, ROBINSON & JONES,

Attorneys for the Defendant.

Received a copy of the within this 13th day of July, 1921.

BRONSON, ROBINSON & JONES,

Attorneys for the Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 14, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

United States District Court, Western District of
Washington, Northern Division.

No. 5853.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF O. HANA,

Defendant.

Praeipce for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare a typewritten transcript of record in the above-entitled cause on writ of error, and file the same in the United States Circuit Court of Appeals for the Ninth Circuit, said record to comprise the following papers:

1. Complaint.
2. Demurrer.
3. Memorandum decision.
4. Petition for reargument.
5. Memorandum decision on petition for reargument.
6. Judgment.
7. Petition for writ of error.
8. Assignment of errors.
9. Order allowing writ of error.
10. Admission of service.
11. Praeipce for transcript of record.

ROBT. C. SAUNDERS,

United States Attorney.

CHARLOTTE KOLMITZ,

Assistant United States Attorney. [18]

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing, as provided under rule 105 of this Court.

ROBERT C. SAUNDERS,
United States Attorney,
CHARLOTTE KOLMITZ,
Assistant United States Attorney,
Attorneys for Plaintiff.

We hereby acknowledge service of copy of the foregoing praecipe, waive the right to request the insertion of any other matters than those incorporated in the foregoing praecipe, and stipulate that the proceedings, papers, orders and documents included in said praecipe constitute a full and sufficient record upon writ of error.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 14, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

United States District Court, Western District of
Washington, Northern Division.

No. 5853.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLAF O. HANA,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 19, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing-entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses and costs in-

curred in my office on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.), for making record, certificate or return, 42 folios at 15c.....	\$6.30
Certificate of clerk to transcript of record, 4 folios at 15c.....	.60
Seal to said certificate.....	.20

[20]

I hereby certify that the above cost for preparing and certifying record, amounting to \$7.10, will be included in my quarterly account to the Government of fees and emoluments for the quarter ending September 30th, 1921.

I further certify that I hereto attach and herewith transmit the original citation, and original writ of error issued in this cause, together with acceptance of service thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 26th day of July, A. D. 1921.

[Seal]

F. M. HARSHBERGER,
Clerk of United States District Court, Western District of Washington. [21]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

OLAF O. HANA,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to
the Honorable Judges of the District Court of
the United States for the Western District of
Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
said District Court, before the Honorable Jeremiah
Neterer, between United States of America, the
plaintiff in error, and Olaf O. Hana, the defendant
in error, a manifest error hath happened to the
prejudice and great damage of United States of
America, plaintiff in error, as by its complaint and
petition herein appears, and we being willing that
error, if any hath been, should be duly corrected,
and full and speedy justice done to the party afore-
said in this behalf, DO COMMAND YOU, if judg-
ment be therein given, that under your seal, dis-
tinctly and openly, you send the record and proceed-
ings with all things concerning the same, to the
United States Circuit Court of Appeals for the

Ninth Circuit, at the City of San Francisco, State of California, together with this writ, so that you have the same at said City of San Francisco within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then and [22] there inspected, said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States of America, should be done in the premises.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 14th day of July, 1921, and the year of the Independence of the United States one hundred and forty-fourth.

[Seal]

F. M. HARSHBERGER,

Clerk of the District Court of the United States for the Western District of Washington.

Acceptance of service of within writ of error acknowledged this 13th day of July, 1921.

BRONSON, ROBINSON & JONES,

Attorneys for Defendant in Error. [23]

[Endorsed]: No. 5853. In the District Court of the United States for the Western District of Washington, Northern Division. United States vs. Olaf O. Hana. Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 14, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

OLAF O. HANA,

Defendant in Error.

Citation on Writ of Error.

The United States of America,—ss.

The President of the United States of America, to
BRONSON, ROBINSON & JONES, Attorneys
for Defendant in Error, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the United States of America is plaintiff in error, and Olaf O. Hana is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United

States for the Western District of Washington,
Northern Division, this 14th day of July, 1921.

JEREMIAH NETERER,

United States District Judge.

[Seal] (Attest:) F. M. HARSHBERGER,
Clerk of the District Court of the United States,
for the Western District of Washington, North-
ern Division. [24]

[Endorsed]: No. 5853. In the District Court of
the United States for the Western District of Wash-
ington, Northern Division. United States vs. Olaf
O. Hana. Citation on Writ of Error. Filed in the
United States District Court, Western District of
Washington, Northern Division. Jul. 14, 1921.
F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 3727. United States Circuit
Court of Appeals for the Ninth Circuit. The
United States of America, Plaintiff in Error, vs.
Olaf O. Hana, Defendant in Error. Transcript of
Record. Upon Writ of Error to the United States
District Court of the Western District of Wash-
ington, Northern Division.

Filed July 29, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
OLAF O. HANA,
Defendant in Error.

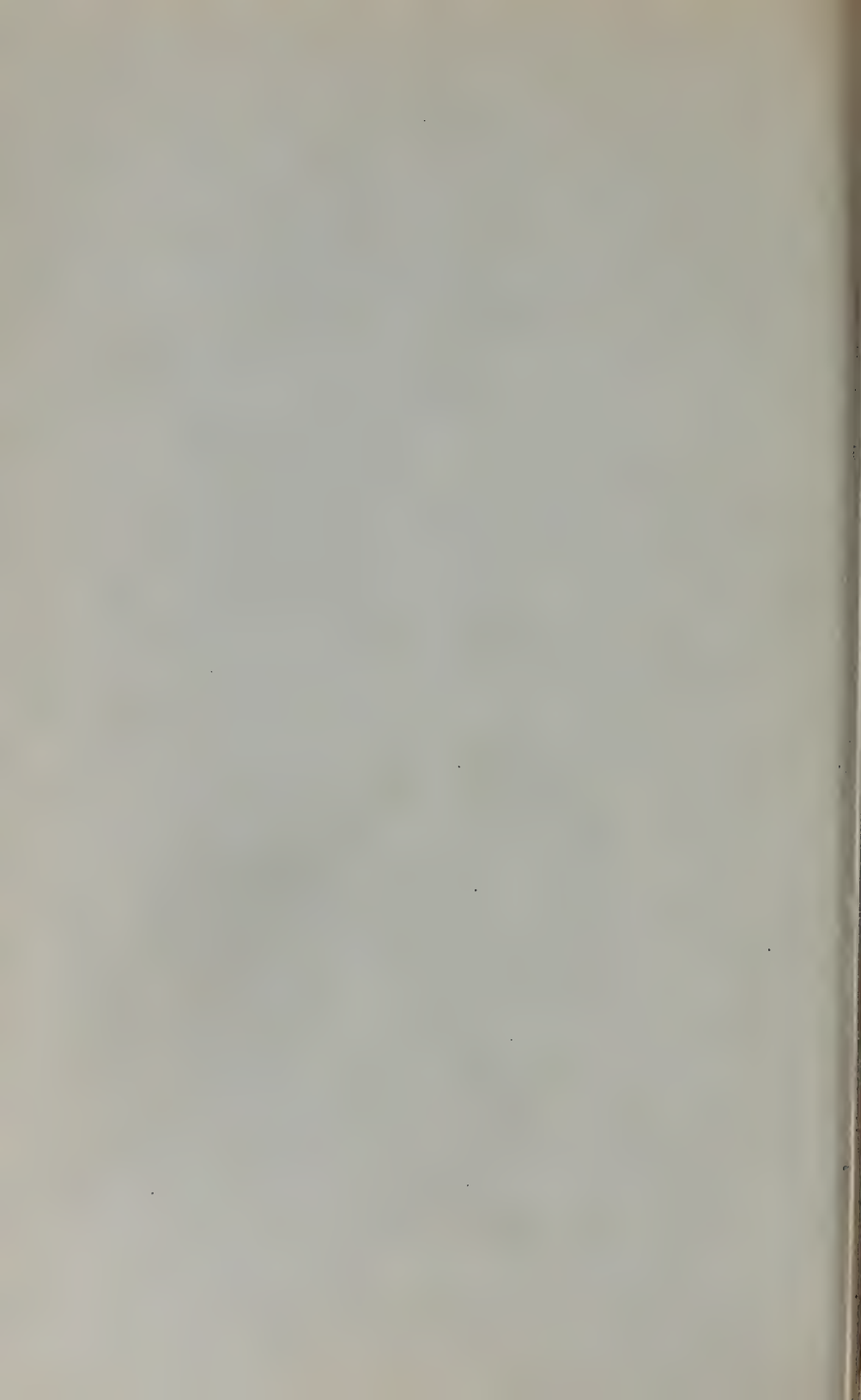
UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

ROBERT C. SAUNDERS,
United States Attorney.

CHARLOTTE KOLMITZ,
Assistant United States Attorney.

Office and Post Office Address: 310 Federal Bldg.,
Seattle, Wash.



In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
OLAF O. HANA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The defendant in error was master of the American steamship "H. B. Lovejoy." On the 31st of January, 1921, the steamer "H. B. Lovejoy" arrived at the port of Seattle in the Northern Division of the Western District of Washington from a foreign port. Said defendant in error filed with the Collector of Customs at the port of Seattle certain manifests and store lists of the merchandise, purporting to be complete and correct manifests and store lists of all merchandise on board. Thereafter

the Customs Inspector found on board said vessel certain liquor which had not been manifested or which had not appeared on the store list, and thereafter a penalty under Section 2809 R. S. equal to the appraised value of the liquor, to-wit, \$73.50, was assessed against the said defendant in error by the Customs Department. Upon demand said defendant in error refused to pay this sum and thereafter a complaint was filed in the District Court to recover said sum from said defendant in error, to which complaint defendant in error filed a general demurrer. The court in its memorandum decision (Tr. p. 8) sustained the demurrer and thereafter petition for re-argument was filed and petition denied (Tr. p. 12). Judgment for defendant in error was accordingly entered, to which plaintiff in error duly excepted.

This writ of error is prosecuted from the judgment.

ARGUMENT.

This is a proceeding brought under Sec. 2809, R. S. (Comp. Stat. 5506), which provides that:

“If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or de-

scribed in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited."

The question in this case is: "Is liquor merchandise; can it be legally imported and must it be manifested?" The courts have interpreted the term "merchandise" variously. Section 2766, R. S., defines it as "goods capable of being imported." In the case of *U. S. vs. Feathers of Wild Birds*, 267 Fed. 964, at 967, the court interprets merchandise to mean, "physically capable of being imported," and in the case of *U. S. vs. Sisco*, 270 Fed. 958, as "legally capable of being imported."

It is not necessary in this case to insist on a broad definition of merchandise. Liquor comes within the more restricted definition of merchandise, of the *Sisco* case, *supra*, that is, "goods legally capable of being imported." Liquor may be legally imported—Section 27, Title II, National Prohibition Act—and is therefore merchandise.

In the case of *U. S. vs. The Goodhope* (District Court, West. Dist. of Wash.), 268 Fed. 694, at 695, the court says:

“It is apparent from the provisions of this Act (N. P. Act) that intoxicating liquor may be imported for non-beverage purposes.”

It is fundamental that the mere fact that all goods whether dutiable or non-dutiable must be manifested. It is for the customs inspector to ascertain the dutiability and assess the proper duty. In the case of impure tea, impure tea is forbidden importation, but would this court hold that tea because found to be impure need not be manifested? It is for the customs inspectors to ascertain whether after it is manifested it could be imported; that would depend upon analysis of its quality. It is for the customs inspector to ascertain whether the tea is of a quality that could be imported. So, in the case of liquor, it is for the customs inspector to ascertain whether the provisions of the law have been complied with, and to refuse its entry to the customs house until the provisions have been complied with. It is no more proper for a master of a boat to say what he should manifest in regard to liquor or impure tea than would be the case of goods on which there was no duty. The customs inspector and not the master shall decide, and to facilitate the operation of the law manifests are necessary.

Goldman vs. U. S., 263 Fed. 340.

In the *Sischo* case, 270 Fed. 958 (now before the Supreme Court of the United States on writ of *certiorari*, the court (opinion of Judge Wolverton) there says:

“We should bear in mind that opium and its derivatives, except smoking opium, are subject to importation for medicinal purposes, and it is no doubt the intendment of Section 2809, R. S., that such merchandise should be included in the vessel’s manifest. It is capable of being imported in the sense that its importation is not unlawful.”

So too, again with liquor: Liquor is subject to importation for medicinal, mechanical and scientific purposes, and it was no doubt the intendment of Section 2809, R. S., that such merchandise should be included in the vessel’s manifest. Judge Hunt, while he dissented to the holding of the court as regards smoking opium, uses the following words:

“Suppose a cargo of *liquor* is brought over, or a quantity of aigrette or osprey plumes, or skins of wild birds, none of which may lawfully be brought into the country; would not the statute defining merchandise include them?”

as though it was beyond his comprehension to imagine that such a question would ever be raised. However, Judge Hunt did lose sight of the fact that all of the articles enumerated by him could be lawfully imported conditionally.

In the case of *Goldman vs. U. S.* (C. C. A.), 263 Fed. 340, a conviction for smuggling and receiving a coil of rope which had been landed from a foreign port without permit from a Commissioner of Internal Revenue, was affirmed. There the court considered Section 3082 R. S., and said:

“We think Section 3082 was not intended to be limited to cases of smuggling in the sense of introducing dutiable merchandise without paying and with the intent to avoid paying the duty on it. The proper administration of the customs laws requires it to be given a wider scope. It is important, in order to enforce the collection of duties, to establish many regulations relating to the introduction of merchandise into the country, other than the ultimate one of requiring the payment of duties. These are auxiliary regulations and can only be enforced by the imposition of penalties and punishment for their infraction.”

The mere fact that liquor can not be imported or sold in the open market without restrictions should not take away the character of merchandise. To do this would be to say that all articles on which any restriction is placed as to their sale or importation are not merchandise; this would include firearms, cigarettes, dynamite and other explosives, narcotics, feathers of wild birds, skins of certain animals, a coil of rope as suggested in the case of

Goldman vs. U. S. above cited, and other articles too numerous to mention.

The plaintiff in error contends that the conclusion of the District Court that liquor improperly imported is not merchandise because it can not be appraised and sold in accordance with the customs statutes is manifestly unsound; for, as provided in Section 27, National Prohibition Act, a court order may be taken for the sale of forfeited liquors to persons holding permits to purchase. The liquor thereupon becomes a legitimate article of commerce in accordance with the National Prohibition Act and regulations of the Commissioner of Internal Revenue.

Furthermore, it is respectfully called to the court's attention that the case of *The Goodhope*, above cited, on which the District Court seems to have largely based its opinion in this case, was in turn based on the opinion of the Circuit Court of Appeals in the case of *U. S. vs. One Ford Automobile*, 262 Fed. 374, which has no application here since it is confined solely to a consideration of a war measure—the Act of August 10, 1917, which is not to be confused with the National Prohibition Act. The Act of August 10, 1917, strictly forbids the importation of liquor, while the National Prohibition Act makes

provision for the importation of liquor and has a further proviso that it (the N. P. Act) is in no way to repeal existing statutes except where inconsistent. However, since the decision of *The Goodhope* case, the Circuit Court of Appeals for the Second Circuit, in the case of *U. S. vs. Feathers of Wild Birds, supra*, has, to all intents and purposes, reversed its holding in the *One Ford Automobile* case, 262 Fed. 374, *supra*.

In considering this case the court's attention is respectfully invited to Section 2775, R. S., requiring the manifesting of liquors.

We submit that the judgment of the trial court should be reversed, with directions to overrule the demurrer.

Respectfully submitted,

ROBERT C. SAUNDERS,
United States Attorney.

CHARLOTTE KOLMITZ,
Assistant United States Attorney.

No. **3745**

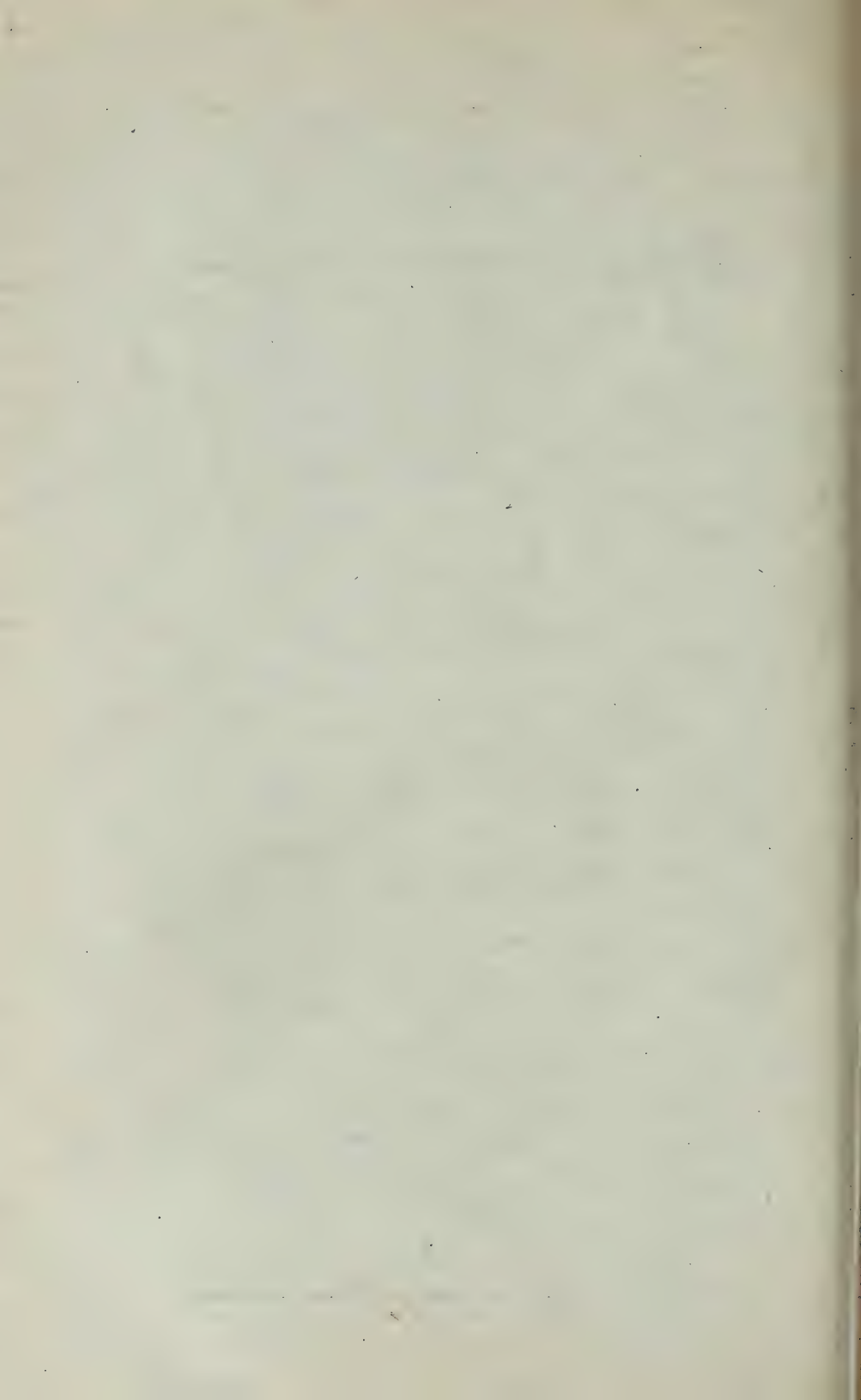
United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA
Plaintiff, Appellant,
vs.
BHAGAT SINGH THIND,
Defendant, Respondent.

Transcript of Record

Upon Appeal From the United States District Court
for the District of Oregon

FILED
AUG 5 - 1927
F. D. MONGKTON,
CLERK



No. _____

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA
Plaintiff, Appellant,
vs.
BHAGAT SINGH THIND,
Defendant, Respondent.

Transcript of Record

Upon Appeal From the United States District Court
for the District of Oregon

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Names and Addresses of Attorneys of Record

MR. LESTER W. HUMPHREYS, United States
Attorney, District of Oregon, Portland Oregon.
For Appellant.

MR. THOMAS MANNIX, Yeon Building, Portland,
Oregon.

For Respondent.

CITATION ON APPEAL

UNITED STATES OF AMERICA, ss.

To BHAGAT SINGH THIND: Greetings:

YOU ARE HEREBY CITED and ADMON-
ISHED to be and appear in the United States Circuit
court of Appeals, Ninth Circuit, to be held at San
Francisco, California, on the 18th day of July, 1921,
pursuant to an appeal filed in the Clerk's Office of
the District Court of the United States for the Dis-
trict of Oregon, wherein the United States of America
is appellant and Bhagat Singh Thind is respondent,
to show cause, if any there be, why the judgment in
said appeal mentioned should not be corrected and
speedy justice should not be done to the parties in
that behalf.

Given under my hand at Portland in said District
this 17th day of June, 1921.

CHAS. E. WOLVERTON,

District Judge.

DISTRICT OF OREGON,)

) ss.

County of Multnomah)

Due service of the within citation is hereby ac-
cepted in Multnomah County, Oregon, this 17th day
of June, 1921.

THOMAS MANNIX,

Attorney for Bhagat Singh Thind.

On the 17th day of June, 1921, there was duly filed in the District Court of the United States for the District of Oregon a notice of appeal and assignment of error, in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,)
	Plaintiff, Appellant,)
vs.)
BHAGAT SINGH THIND,)
	Defendant, Respondent.)

NOTICE OF APPEAL.

The above named plaintiff, United States of America, hereby appeals to the Circuit Court of Appeals, Ninth Circuit, from the Order entered on March 28, 1921, in the above entitled Court and cause, dismissing the Bill of Complaint of plaintiff, and plaintiff prays that this appeal may be allowed and that a transcript of the record and proceedings and papers upon which the aforesaid order was made, duly authenticated, may be sent to the said Circuit Court of Appeals, Ninth Circuit.

LESTER W. HUMPHREYS,

United States Attorney.

Portland, Oregon, June 17, 1921.

And now, to-wit: on June 17, 1921,

IT IS ORDERED that the appeal be allowed as prayed for.

CHAS. E. WOLVERTON,

District Judge.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

BHAGAT SINGH THIND,)

Defendant.)

ASSIGNMENTS OF ERROR ON APPEAL.

Comes now the above named plaintiff and appellant and in connection with the appeal in the above entitled cause makes the following assignments of error which it avers occurred in said cause:

I.

The court erred in sustaining defendant's motion to dismiss plaintiff's bill of complaint.

II.

The court erred in ruling that the defendant was entitled under the law to naturalization as a citizen of the United States.

LESTER W. HUMPHREYS,

United States Attorney.

STATE OF OREGON,)

) ss.

County of Multnomah)

Service of the foregoing assignments of error is hereby admitted in Multnomah County, Oregon, this 17th day of June, 1921.

THOMAS MANNIX,

Attorney for Defendant, Bhagat Singh Thind.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

NOVEMBER TERM, 1920.

BE IT REMEMBERED, That on the 8th day of

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,)

Plaintiff,)

VŠ.

BHAGAT SINGH THIND,)

Defendant.)

BILL OF COMPLAINT IN EQUITY.

To the Honorable Judges of the District Court of the
United States for the District of Oregon:

The UNITED STATES OF AMERICA, by Lester W. Humphreys, United States Attorney for the District of Oregon, pursuant to authority conferred upon him by the laws of the United States, brings this, its Bill of Complaint, against the above named defendant, and for cause of suit alleges:

I.

That the defendant, Bhagat Singh Thind, now resides in Multnomah County, State of Oregon, and within the jurisdiction of this Court, and since on or about the 18th day of November, 1920, has claimed to be a citizen of the United States by reason of certain hereinafter described proceedings in naturalization.

II.

That the District Court of the United States for the District of Oregon is a court having jurisdiction to naturalize aliens in the said State of Oregon, in which the naturalized alien, to-wit: Bhagat Singh

Thind, then resided and had so resided for some time prior to the said 18th day of November, 1920.

III.

That on or about the said 18th day of November, 1920, the said defendant above named was then and there an alien and subject to a foreign state and sovereign, to-wit: a person who was born within the territorial limits of India and was a subject of the King of Great Britain and Ireland and was admitted to become a citizen of the United States by the District Court of the United States for the District of Oregon on the said 18th day of November, 1920, and a certificate of naturalization was on said date issued and delivered to the said defendant under and by virtue of an order of said District Court of the United States for the District of Oregon, made and entered on or about the 18th day of November, 1920, and certificate of naturalization No. 1076938 was then and there issued to the said defendant, Bhagat Singh Thind, and ever since said date the said defendant has claimed and now claims to be a citizen of the United States by reason thereof.

IV.

That said defendant is a native of India, of full Indian blood and was born in Amrit Sar Punjab, India.

V.

That the said certificate of naturalization issued and delivered to said defendant as described in Paragraph III. hereof, was illegally procured from the said District Court of the United States for the District of Oregon, in this, to-wit: that the said defendant is not a free white person and was not a free white person on the said 18th day of November, 1920.

VI.

That under the naturalization laws of the United States of America, the said defendant was not and is not entitled to naturalization as a citizen of the United States.

VII.

That before the filing of this Bill of Complaint there had been delivered to and is now in the possession of the said United States Attorney an affidavit made and delivered by V. W. Tomlinson, United States Naturalization Examiner, showing good cause for the institution of this proceeding, which affidavit is hereto attached and incorporated herein, and is by this particular reference made a part of this Bill of Complaint as Exhibit "A".

That plaintiff has no plain, speedy and adequate remedy at law, but only in this court of equity having jurisdiction therein,

WHEREFORE PLAINTIFF PRAYS:

1. That process issue out of this court in accordance with the laws relating to naturalization proceedings and the rules and processes of this court, requiring the defendant herein to be and appear in the above entitled court on a day certain, to-wit: sixty days after the date of service thereof.

2. That said defendant be required to answer this Bill of Complaint and have a decree cancelling said certificate of naturalization taken pro confesso.

3. That the order of the said District Court of the United States for the District of Oregon, made on the said 18th day of November, 1920, and admitting the defendant herein to be a citizen of the United States of America be vacated and set aside.

4. That the certificate of citizenship No. 1076938,

issued out of the District Court of the United States for the District of Oregon, and delivered to the said Bhagat Singh Thind, be revoked and cancelled.

5. That the said defendant, Bhagat Singh Thind, be ordered to refrain and be enjoined from ever after using or enjoying any of the rights, privileges and benefits under the said certificate of naturalization, and

6. That plaintiff herein have such other, further and different relief as the nature of his case may require, or as to this Court may seem meet and just in equity.

LESTER W. HUMPHREYS,
United States Attorney,
Solicitor for Plaintiff.

EXHIBIT "A".

UNITED STATES OF AMERICA,)
) ss.
DISTRICT OF OREGON.)

I, V. W. TOMLINSON, being first duly sworn, depose and say that I am a duly appointed and acting Naturalization Examiner of the Bureau of Naturalization, Department of Labor, with official headquarters at Portland, Oregon; that as such Naturalization Examiner I am acquainted with one Bhagat Singh Thind, who heretofore filed petition for naturalization No. 988 in the United States District Court, at Portland, Oregon, and who, on or about the 18th day of November, 1920, was admitted to citizenship as a citizen of the United States in said United States District Court at Portland, Oregon; that as such Naturalization Examiner I conducted such investigation and examination as was had and made of the qualifications of the said Bhagat Singh Thind to become a

•

9. 27

G. H. MARSH,

ALL RIGHT DIGITIZED COPY OF THE ORIGINAL

UNITED STATES OF AMERICA)

Plaintiff)

),

THE SINGH THIND

Defendant)

Now comes the defendant in the above entitled

suit and demurs to the complaint filed in the above entitled case for the reasons:

I.

That the complaint filed in the above entitled case does not state facts sufficient to obtain any relief in equity;

II.

For the further reason that it appears on the face of the said complaint that all the matters set forth therein have already been judicially passed upon by the admission of the said defendant to citizenship on or about the 18th day of November, 1920:

III.

That no matters of fraud, accident or mistake are set forth in the plaintiff's complaint which would justify the interposition of a court of equity;

IV.

That the affidavit filed by V. W. Tomlinson, upon which the bill of complaint is principally based appears to contain nothing except matters already passed upon and adjudicated in the proceedings for naturalization, and further are the mere opinions of the said Tomlinson without any facts being set forth upon which the said opinions could be properly arrived at.

THOMAS MANNIX,

Attorney for Defendant.

STATE OF OREGON,)

) ss.

County of Multnomah.)

I, Thomas Mannix, one of the defendant's attorneys, do hereby certify that in my opinion the foregoing demurrer is well founded in law.

THOMAS MANNIX,

Attorney for Defendant.

Served 15th March, 1921.

L. W. HUMPHREYS,

United States Attorney.

AND AFTERWARDS, to-wit, on Monday, the 28th day of March, 1921, the same being the 19th judicial day of the regular March term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to-wit: IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

BHAGAT SINGH THIND,)

Defendant.)

ORDER DISMISSING BILL.

This cause coming on for hearing on motion of defendant to dismiss plaintiff's Bill of Complaint, and it appearing that the complaint does not state facts sufficient to justify relief in equity, for the reason that said bill seeks cancellation of defendant's citizenship on the ground that said defendant is a Hindu, and a native of Punjab, India, and it further appearing that a Hindu is entitled under the laws of the United States to admission to citizenship,

It is THEREFORE, ORDERED, that plaintiff's bill be and it is hereby dismissed.

Portland, Oregon, March 28, 1921.

(Sg.) CHAS. E. WOLVERTON,

District Judge.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 11, inclusive, constitute the transcript of record upon appeal from the decree of the District Court of the United States for the District of Oregon in a cause in that court in which the United States of America is plaintiff and appellant and Bhagat Singh Thind is defendant and respondent; that I have compared the foregoing transcript with the original record thereof and that the same is a true and complete transcript of the record of proceedings had in said court in said cause as the same appear of record and on file in my office and in my custody.

IN WITNESS WHEREOF, I have hereunto affixed my hand and the seal of said court, at Portland, in said District, this ^{2d} ~~day~~ ^{August} of July, 1921.

G. H. MARSH,
Clerk, United States District Court for the
District of Oregon.



No. 3745

IN THE

**United States Circuit Court
of Appeals**

For the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff, Appellant,

vs.

BHAGAT SINGH THIND,

Defendant, Respondent.

BRIEF OF APPELLANT.

Upon Appeal From the United States District Court
for the District of Oregon.

LESTER W. HUMPHREYS,

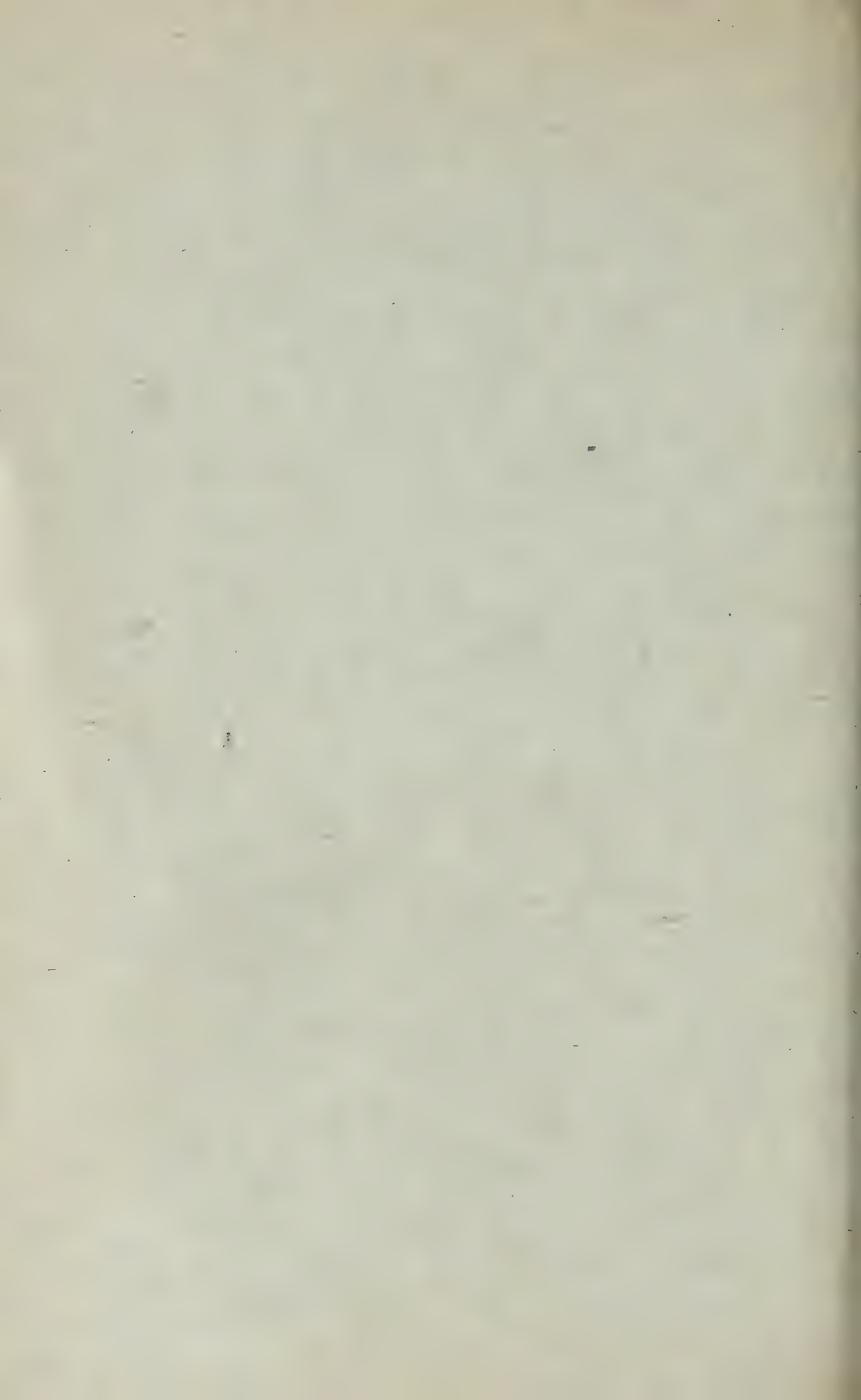
United States Attorney for Oregon.

For Appellant.

FILED

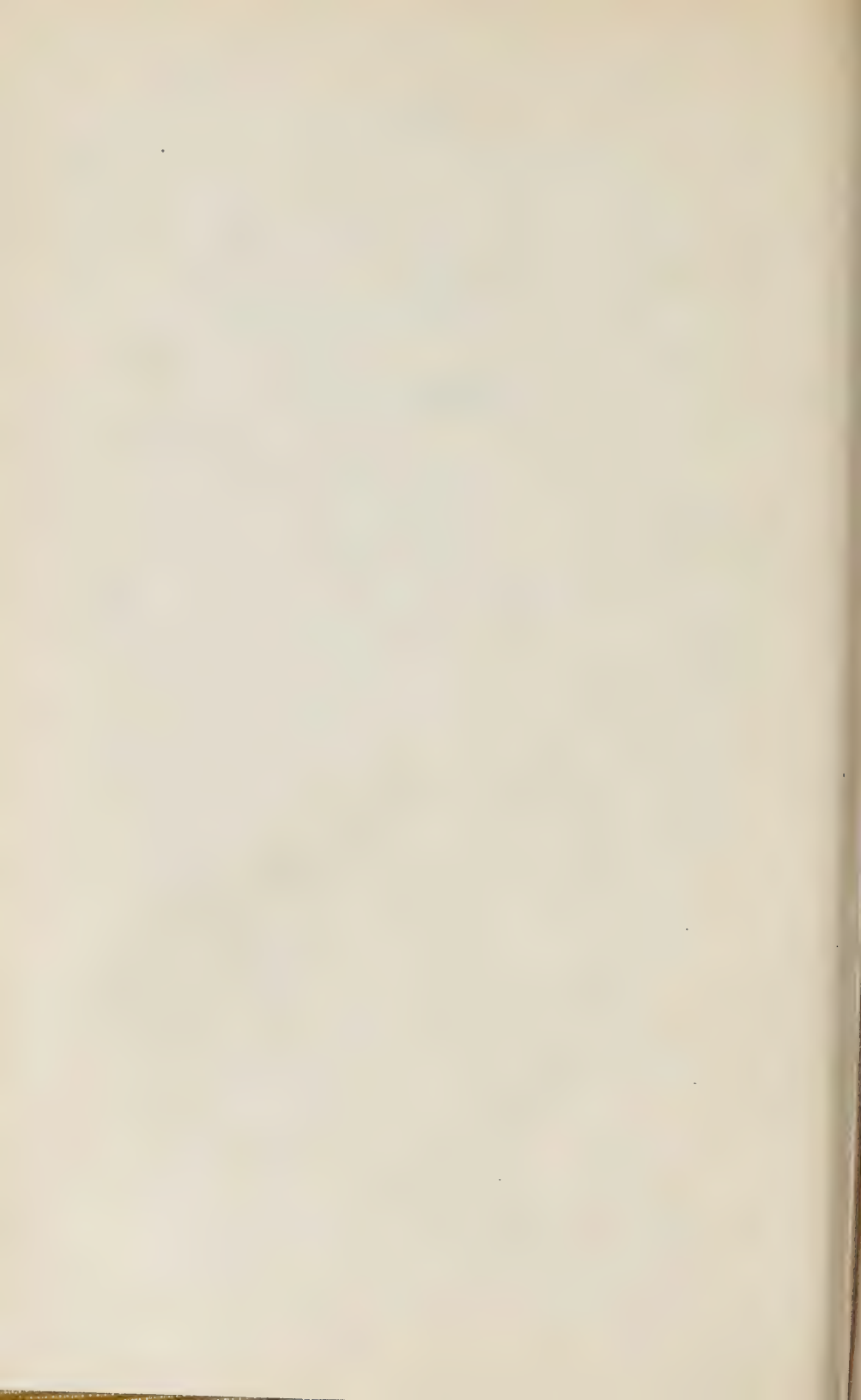
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U. S. DISTRICT COURT



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No. 3745

IN THE

United States Circuit Court
of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff, Appellant,

vs.

BHAGAT SINGH THIND,

Defendant, Respondent.

BRIEF OF APPELLANT.

Upon Appeal From the United States District Court
for the District of Oregon.

LESTER W. HUMPHREYS,

United States Attorney for Oregon.

For Appellant.

STATEMENT.

Bhagat Singh Thind was naturalized in the District Court at Portland, November 18, 1920. He is a native of India, of full Indian blood, and was born at Amrit Sar, Punjab.

After his naturalization, the United States filed a bill in equity to cancel his citizenship on the ground that it was illegally procured, in that the applicant, being a Hindu, was not entitled under the naturalization laws to citizenship.

Thereafter he appeared by counsel and filed a demurrer to the bill. This was treated at the argument as a motion to dismiss, and an order dismissing the bill was made for the reason "that said bill seeks cancellation of defendant's citizenship on the ground that said defendant is a Hindu, and a native of Punjab, India, and it further appearing that a Hindu is entitled under the laws of the United States to admission to citizenship." (Trans. 10.)

This is an appeal from the dismissal of the bill.

SPECIFICATION OF ERROR.

I.

The Court erred in sustaining defendant's motion to dismiss plaintiff's bill of complaint.

II.

The Court erred in ruling that the defendant was

entitled under the law to naturalization as a citizen of the United States.

POINTS AND AUTHORITIES.

I.

Under Section 15 of the Naturalization Act, a certificate of citizenship granted by the court on a state of facts showing the petitioner not qualified for citizenship, is subject to be annulled in an independent suit by the United States as being illegally procured.

U. S. vs. Ginsberg, 243 U. S. 472-475.

U. S. vs. Mulvey, 232 Fed. 513.

II.

A Hindu can not be naturalized unless he be a "free white person."

Section 2169 R. S.

III.

Hindus are not "white persons" within the meaning of the statute.

In re Sadar Bhagwab Singh 246 Fed. 496.

Ex parte Shahid 205 Fed. 812.

Ex parte Dow 211 Fed. 486.

Ex parte Dow 213 Fed. 355.

Contra:

In re Mohan Singh 257 Fed. 209.

Dow vs. U. S. 226 Fed. 145.

U. S. vs. Balsara, 180 Fed. 694.

In re Akhay Kumar Mozumdar 207 Fed. 115.

In re Bhagat Singh Thind 268 Fed. 683.

Other cases discuss the question who are "white persons."

In re Ah Yup 5 Saw. 155; 1 Fed. Cas. No. 104.

In re Camille 6 Fed. 256.

In re Saito 62 Fed. 126.

In re Ellis 179 Fed. 1002.

In re Halladjian 174 Fed. 834.

In re Mudarri 176 Fed. 465.

In re Young 198 Fed. 715.

IV.

Naturalization laws are not in derogation of common right; they should not be strictly construed against the United States, but rather against the alien.

U. S. vs. Rodgers, 185 Fed. 334-338.

V.

An alien has no right to be naturalized except by statutory grant.

Zartarian vs. Billings, 204 U. S. 170-175.

Lapina vs. Williams, 232 U. S. 78-88.

U. S. vs. Ginsberg, 243 U. S. 472-475.

VI.

An alien residing in the United States has no vested right to remain. He is here as a matter of pure permission, of simple tolerance.

Colyer vs. Skeffington, 265 Fed. 17-23.

Fong Yue Ting vs. U. S. 149 U. S. 698-708.

VII.

It is not enough that the applicant for citizenship be a "white person"; he must also be a person not within the classes excluded by the immigration laws.

2 Corpus Juris 1114.

In re Rustigian 165 Fed. 980-983.

VIII.

Hindus are excluded from entry into the United States.

39 Stat. L. 875; Sec. 3 Act of Feb. 5, 1917.

IX.

The object and purpose of exclusion acts is to protect the country from the advent of aliens whose race or habits render them undesirable as citizens.

Wong Wing vs. U. S., 163 U. S. 228-237.

X.

Reports of Committees in Congress may be considered in construing Acts of Congress.

Lapina vs. Williams, 232 U. S. 78-90.

XI.

The exclusion section of the Act of Feb. 5, 1917, was aimed specifically at the Hindus.

Vol. 1 House Reports, 64th Cong., 1 Sess., H. Rep. 95.

Vol. 2 Senate Reports, 64th Con., 1 Sess., S.

Rep. 352.

Vol. 1 House Reports, 64th Cong., 2 Sess.,
Conf. Rep. 1266-1291.

XII.

All statutes must be given a reasonable construction with a view to effecting the objects and purposes thereof.

Low Wah Suey vs. Backus, 225 U. S. 460-475.

XIII.

Any doubt as to whether an alien is entitled to naturalization should be resolved in favor of the Government.

U. S. vs. Griminger, 236 Fed. 285.

XIV.

Courts are without authority to sanction changes or modifications in the naturalization laws; "their duty is rigidly to enforce the legislative will in respect to a matter so vital to the public welfare."

U. S. vs. Ginsberg, 243 U. S. 472-474.

ARGUMENT

Defendant's demurrer to the bill, which was treated at the argument as a motion to dismiss, challenges the right of the United States to attack defendant's admission to citizenship by a bill in equity. This suit is based on the proposition that defendant's citizenship was "illegally procured," in that the trial

judge erred in applying the law and the facts. His specific error was in holding a Hindu eligible to citizenship.

There is abundant authority for this proceeding, as a means of challenging that ruling, in the case of *U. S. vs. Ginsberg*, 243 U. S. 472. One of the questions there certified by the Circuit Court of Appeals for the Eighth Circuit was this:

"May a certificate of citizenship be set aside and canceled in an independent suit brought under Section 15 of the act of June 29, 1906, c. 3592, on the ground that it was illegally procured if the uncontradicted evidence at the hearing of the petition showed indisputably that the petitioner was not qualified by residence for citizenship and that the court or judge who heard the petition and ordered the certificate misapplied the law and the facts?"

In answering this question in the affirmative, the Supreme Court said (page 475):

"No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon the condition that the Government may challenge it as provided in Section 15 and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge cannot supply these or render their existence non-essential."

A like decision is reported in *U. S. vs. Mulvey*, (2CCA) 232 Fed 513.

Is a Hindu White?

This brings us directly to consider the correctness of the admission of a Hindu to citizenship; and the first question is whether he is a white person within the statute. In admitting this defendant Judge Wolverton filed an opinion reported at 268 Fed. 683.

Those courts which have admitted the Hindu adopt this reasoning: "White persons" means the Caucasian race; the Hindu is Caucasian; therefore he is white.

Who are the "white persons" spoken of in the statute (2169 RS)? This question has been considered by many courts; sometimes answered, sometimes evaded. No other question has been examined with so much careful, often brilliant, ability, and with such bewildering confusion of results. "There have been a number of cases in which the question has been treated, and the conclusions arrived at in them are as unsatisfactory as they are varying" (*Ex parte Shahid* 205 Fed. 812.)

The temptation is strong simply to "dump them into the lap of the court" without comment. This is so because the cases are so hopelessly in conflict, both in reasoning and result, that they cannot possibly be reconciled. It is utterly impossible to secure from them a clear legal rule or principle as a guide. Judge Lowell's opinion (*In re Halladjian* 174 Fed. 834) gives the inquiry elaborate discussion. It reviews two

centuries of ethnological authority, with state and federal statutes, publications of the government, and census reports, and concludes that there isn't such a thing as a "white race" and expresses the hope that Congress may lend its assistance in determining so perplexing a question.

The two most recent cases alike involve the admissibility of the Hindu. (*In re Mohan Singh* 257 Fed. 209; *In re Sadar Bhagwab Singh* 246 Fed. 496.) Here two District judges, with the same question before them, and the same authorities, reach exactly opposite conclusions.

Learned judges have considered the matter from every angle, only to flounder helplessly in the mazes of ethnological theory to indefinite and unsatisfactory conclusions.

Decisions by Circuit Courts of Appeals are the following: *Bessho vs. U. S.*, 178 Fed. 245; *U. S. vs. Balsara*, 180 Fed. 694; *Dow vs. U. S.*, 226 Fed. 145. The matter has never been presented to the Supreme Court for decision.

In point of number, a majority of the courts, including the courts of Appeals of the Second and Fourth Circuits, are committed to the proposition that "white persons" means the Caucasian race. The criticisms of this theory will be stated presently. Other courts have reached these several conclusions: that "white persons" means the European races and their descendants (*Ex parte Shahid* 205 Fed. 812; *Ex parte Dow* 211 Fed. 486; 213 Fed. 355) that it means all European races and those Caucasians

belonging to the races around the Mediterranean Sea (In re Young 198 Fed. 715) that the statute should be amended to make its meaning clear (In re Mudarri 176 Fed. 465) that it means all persons not otherwise classified (In re Halladjian 174 Fed. 834) that Hindus are not within the classes to whom Congress extended the gift of citizenship (In re Sadar Bhagwab Singh 246 Fed. 497.)

The statute is declared to be "most uncertain, ambiguous, and difficult, both of construction and application." (205 Fed. 812). Its language is as follows:

"2169 RS. The provisions of this title shall apply to aliens being free white persons; and to **a**liens of African nativity and to persons of African descent."

This statute was first enacted in 1790. (1 Stat. L. 103-104). In 1873, at the time of the first revision, the words "being free white persons" were omitted, undoubtedly through inadvertance. The act of February, 1875, to correct errors and supply omissions in the first revision, restored the omitted words. The phrase including Africans is one of the phenomena growing out of the Civil War. The history of the legislation is detailed in many of the cases, beginning with re Ah Yup 5 Saw. 155-157; 1 Fed. Cas. No. 104.

As a matter of first impression, one might be inclined to say that "white persons" are Caucasians—seeking to solve the riddle by adopting a supposed synonym instead of a definition.

But, as has been noted, the statute was enacted in 1790. The "Caucasian race" first appeared in the English language 17 years later—and that in England—in a London translation of a work of the German ethnologist, Blumenbach, who coined the word. This translation was published in 1807. Use of the "Caucasian race" in the United States is first noted about 1830, forty years after the date of the statute.

Yet the supposed synonym would not be so indefensible if any one knew what Caucasian means. We find the ethnologists and lexicographers in as much confusion and bewilderment about the Caucasian race as are the courts about "white persons." The origin of the phrase is thus explained, 6 *The Americana* 126:

"Caucasian race; a term introduced into ethnology by Blumenbach . . . Blumenbach believed this to be the original race from which the others were derived and he gave it the epithet of Caucasian because he believed, probably erroneously, that its most typical form—which was also that of man in his highest physical perfection—was to be met with among the mountaineers of Caucasus."

Blumenbach and his invention have been ridiculed by Huxley, Latham and the *Encyclopedia Britannica*, (*In re Dow* 213 Fed. 358-359; reversed 226 Fed. 145:)

"Of all the odd myths that have arisen in the scientific world, the 'Caucasian Mystery' invented quite innocently by Blumenbach is the oldest. A Georgian woman's skull was the handsomest

in his collection. Hence it became his model exemplar of human skulls, from which all others might be regarded as derivations; and out of this, by some strange intellectual hocus-pocus, grew up the notion that the Caucasian man is the prototypic 'Adamic' man and his country the primitive center of our kind."

* * * * *

"The ill chosen name of Caucasian invented by Blumenbach in allusion to a South Caucasian skull of especially typical proportions, and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays who are set down as two distinct races."

Thus the courts which have adopted the Caucasian solution are committed to a word coined after Congress had written the words "white persons" into the statute; are committed to following ethnological theorists in their gropings in the mists and fogs that enshroud prehistoric man, there to try to spell out his origin; and are making the test of American citizenship to depend upon the symmetries of the skull of a woman found by Blumenbach in the mountains of Caucasus or elsewhere; or upon the origin of the native language of the applicant.

No more technical definition of the words "white persons" could well be imagined than to adopt the terms of the ethnologists. Yet the rule is not disputed that the words of a statute are to be taken in their ordinary sense, unless it can be shown they were used in a technical sense (*In re Saito* 62 Fed. 127;

In re Camille 6 Fed. 256; In re Ah Yup 5 Saw 155)

It is clear that the word Caucasian was not known when Congress passed the statute containing the words "white persons." It came later. Therefore Congress did not intend "white persons" to mean Caucasian; unless it be held, as was done in the Fourth Circuit, (*Dow vs. U. S.*, 226 Fed. 145) that the statute must be construed with reference to the meaning of the words "white persons" at the time of the re-enactment in 1873 and 1875. The better rule as to this appears to be that stated by Judge Bledsoe (*In re Mohan Singh* 257 Fed. 209) "In any event the debates in Congress at the time seem to indicate that the action taken in 1875 was taken merely to correct an obvious inadvertence, and therefore, in truth and in fact, it would seem as if the section should now be construed as if the unintentional repeal in 1874 had never occurred."

If "white persons" means Caucasians, then any one not a Caucasian is not eligible to citizenship. Finns and Magyars are not Caucasians. Jews are Semitic or Aryan, and may be Caucasian or not, depending on the turn taken by ethnological theory at the moment. Yet all three, Finns, Magyars, (both Mongolian) and Jews are commonly regarded as white and as such are naturalized.

Again, the term Caucasian, if the opinion of ethnologists may be said to be settled on anything, has now a meaning very different than it had when Blumenbach first coined it and sent it out to startle a

scientific world. From that day to this, its meaning has constantly varied. "Ethnological theories have varied greatly and at short intervals . . . Race, in the present state of things, is an abstract conception" (In re Halladjian 174 Fed. 834-840) To adopt Caucasian as a synonym for "white persons," therefore, is to make qualification for citizenship depend upon the changing opinion of the scientists as to what Caucasian means.

The only theory which will admit the Hindu is the Caucasian. If Congress when it said "white persons" did not mean Caucasians, then no provision for the naturalization of the Hindu was made.

I submit that the Caucasian theory is wrong for the following reasons:

It adopts, not a definition, but a synonym, which is in fact not a synonym at all.

It shifts from the difficulty of defining "white persons" to the greater difficulty of defining Caucasian.

It substitutes a scientific phrase of vague and uncertain meaning for the language used by Congress.

It substitutes for the language of Congress an expression not known in America until forty years after the statute was passed.

It puts upon the statute a technical meaning when every principle of statutory construction requires the words to be taken in their ordinary sense.

It makes naturalization depend upon the ever changing meaning given by ethnologists to Cauca-

sian; denying uniformity to the qualifications for citizenship.

To attempt further comment on the various decisions would involve useless repetition. Even the reasoning stated in them does not lend itself to classification, for different courts appear by the same process of reasoning to have reached different results. Probably the only thing that can be done, after considering the opinions, is to choose the one which most strongly commends itself to the sound judgment of the court. If the rule to be adopted is that to which the greater number of the courts have adhered, the result is to naturalize the Caucasian race, with its attendant difficulties.

I earnestly commend to the consideration of the court the strong opinions of Judge Smith, which must be read together (*Ex parte Shahid* 205 Fed. 812; *Ex parte Dow* 211 Fed. 486; 213 Fed. 355) notwithstanding the reversal by the Fourth Circuit (226 Fed. 145). This reversal is based on the proposition that the meaning of the statute must be that current at the time of the re-enactment of 1875; the weakness of which ruling lies in ignoring the fact that Congress never intended to repeal the condition as to "white persons," but that it was omitted inadvertently in compiling the Revised statutes; and was restored in 1875 on the omission being noted; and further Congress intended in 1875 that in restoring the words "white persons" Asiatics would be excluded from naturalization, and the amendment was adopted with

this understanding of its effect (In re Saito 62 Fed. 127)

The conclusions of Judge Smith are:

"After considering them all in an attempt to evolve, if possible, some definite rule for judicial decision, the conclusion that this court has arrived at is as follows: that the meaning of free white persons is to be such as would naturally have been given to it when used in the first naturalization act of 1790. Under such interpretation it would mean by the term 'free white persons' all persons belonging to the European races, then commonly counted as white, and their descendants. It would not mean a 'Caucasian' race; a term employed only after the date of the statute and in a most loose and indefinite way (205 Fed. 814.)

"In 1790 the distinctions of race were not so well known or carefully drawn as they are today. At that date all Europeans were commonly classed as the white race, and the term 'white' person in the statute then enacted must be construed accordingly. (Id 815)

"In the face of all these difficulties it is safest to follow the reasonable construction of the statute as it would appear to have been intended at the time of its passage, and understand it as restricting the words 'free white persons' to mean persons as then understood to be of European habitancy or descent (Id 815.)

"If the people of the United States, through their representatives in Congress, see fit to exclude by law from citizenship the most worthy and spiritual inhabitants of the globe, it is not for the courts by judicial legislation to gainsay that

law, and substitute for it what in their opinion may be more appropriate and reasonable legislation (Id. 816)."

The Exclusion Act

The effect of the Hindu Exclusion Act is to bar Hindus from citizenship on either of two theories, (1) the applicant is not eligible for naturalization if he is within a class excluded by the immigration laws, or (2) the exclusion act operates as an implied amendment pro tanto of the general statute (2169 RS) conferring naturalization on "free white" aliens. In the court below this second theory was discussed as an implied repeal and was rejected (168 Fed. 683).

In general it may be said that all statutory construction in naturalization cases must be strict in favor of the United States and against the alien. The controlling principle which lies at the foundation of every case must be the inquiry what is required by the best interest of America; and not what is advantageous to the individual alien applicant.

Without a statutory grant, no alien could be naturalized (*Zartarian vs. Billings*, 204 U. S. 170-175.) "The authority of Congress over the general subject-matter is plenary; it may exclude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country." (*Lapina vs. Williams*, 232 U. S. 78-88.) "The right of aliens to acquire citizenship is purely statutory. Laws regulating and restricting such admission are not in derogation of common right, and

there is therefore no rule of strict construction to be applied to these statutes as against the United States, in favor of one seeking such admission. On the contrary, an applicant for admission to citizenship must show strict compliance with the conditions imposed by law upon his admission" (U. S. vs. Rodgers, 185 Fed. 334-338.) "There is no constitutional limit to the power of Congress to exclude or expel aliens. An invitation once extended to the alien to come within our borders may be withdrawn. He has no vested right to remain." (Colyer vs. Skeffington, 265 Fed. 17)

Whether the Hindu here involved be held to be a white person or not, he was not qualified to become a citizen for the reason that since 1917 his race has been barred by the immigration laws of the United States. This exclusion statute per se operates to disqualify the defendant, notwithstanding his prior lawful entry into the United States. For if Congress has said that Hindus are not wanted in the United States at all, how can the courts say that those already here are desirable material for citizenship? This is a matter "vital to the public welfare." Does such a conclusion serve the public welfare? Is it that rigid enforcement of the legislative will required by U. S. vs. Ginsberg, 243 U. S. 472-474?

The rule is thus stated in *Corpus Juris* (2 C. J. 1114.)

"But it is not enough that the applicant for naturalization comes within this classification (free white persons). **He must also be a person**

not within the classes excluded by the immigration laws."

The same language is used In re Rustigian 165 Fed. 980-983.

The Hindu exclusion act is contained in the act of February 5 1917 (39 Stat. L. 875) Sec. 3:

"That the following classes of aliens shall be excluded from admission into the United States . . . unless otherwise provided for by existing treaties, persons . . . who are natives of any country, province, or dependency situate on the continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from greenwich, and south of the fiftieth parallel of latitude north, except that portion of said territory (describing the Philippine Islands.)

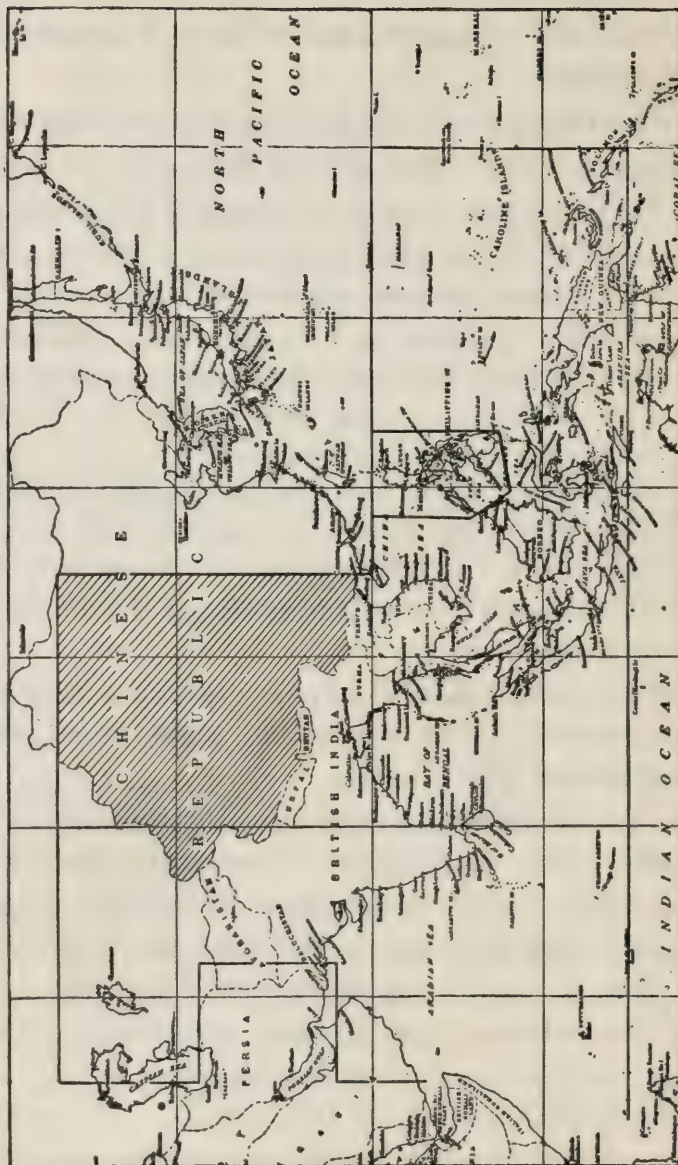
For convenience a map is reproduced on page 20, showing those parts of Asia from which immigration is forbidden.

This exclusion act was aimed specifically at the Hindu. This is shown to a demonstration by the Committee reports in Congress, which may properly be consulted, (*Lapina vs. Williams*, 232 U. S. 78-90).

The House Committee reported the bill with a recommendation that it pass, with this comment touching Section 3: "Hindus, by name, are added to the excluded classes by this section. So are those who cannot become eligible to become naturalized citizens of the United States." (Vol. 1 House Reports, 64th Cong., 1st Sess., H. Rep. 95.) The bill

MAP SHOWING AREAS IONE PRESCRIBED IN SECTION THREE OF IMMIGRATION ACT, THE NATIVES OF WHICH ARE EXCLUDED FROM THE UNITED STATES, WITH CERTAIN EXCEPTIONS.

(Excluded included by General Line imposed by treaty and law relating to China. The Philippine Islands are United States possessions and therefore not included in barred area.)



then went to the Senate, where it was amended by substituting a description of territory in Asia for the designation of Hindus. (Vol. 2, Senate Reports, 64th Cong. 1st Sess. S. Rep. 352.)

In Conference Committee the Senate Amendment was agreed to, and the House Conference members made this report: "The managers on the part of the House agree to so much of this amendment (inserted by the Senate Committee on Immigration) as substitutes for the provision contained in the bill as passed by the House excluding Hindus and persons who cannot become eligible for naturalization a provision excluding aliens who are natives of certain islands and mainland territory of Asia defined by longitudinal and latitudinal lines" (Vol. 1, House Reports 64, Cong. 2nd Sess., Conf. Rep. 1266-1291.) This report was made 13 January, 1917, just before the passage of the Act, which was then vetoed because it contained the "literacy test", and was passed notwithstanding the veto, by the House February 1, 1917, and by the Senate February 5, 1917.

The purpose to exclude Hindus is borne out by the debates, which have not the force of Committee reports, but do in fact corroborate them (Cong. Rec. 64, Cong. 2nd Sess., pt. 1, page 221.)

Senator Lodge:

"The only change from the bill which was vetoed was the insertion of the word 'Hindus'—Hindus and persons who cannot become eligible under existing law. The purpose of that was to exclude Asiatic immigration, Mongolians

having been held by the Courts to be not eligible to naturalization. The House put in the word 'Hindus' because there might be some doubt about it. . . . Therefore, instead of describing the excluded persons as those not eligible for naturalization or by the word 'Hindus', the Committee took the same people within geographical lines and excluded them."

These quotations also show the legislative view that Hindus are not and were not eligible for citizenship.

"All Statutes must be given a reasonable construction with a view to effecting the object and purposes thereof." (Low Wah Suey vs. Backus, 225 U. S. 460-475.)

It is confidently affirmed that the legislative purpose concerning Hindus is not effected by admitting them to citizenship.

The fact that Bhagat Singh Thind, when he applied for naturalization, was within a class excluded by the immigration laws, operated under the authorities above quoted to disqualify him for naturalization. His application should have been denied on that ground. When Congress said that the Hindu is undesirable to such a degree that he is denied entry into the country, the result is that he is not desirable nor qualified to become a citizen.

His prior lawful entry gave him no vested rights.

"He is none the less an alien because of his having a commercial domicile in this country. Lem Moon Sing vs. U. S. 158, U. S. 538-547.) "An invitation once extended to the alien to come within our borders may be withdrawn." (Colyer

vs. Skeffington, 265 Fed. 17.) "None of these excluded classes would be any less undesirable if previously domiciled in the United States." (Lapina vs. Williams, 232 U. S. 78-92.) "It seems entirely unreasonable to hold that it was the intention of Congress to confer American citizenship upon an alien who is excluded by the immigration acts from admission to the country." (In re Rustigian, 165 Fed. 980-983.)

An alien must find his right to naturalization in a grant of Congress. Bhagat Singh Thind must show that he is one of those whom Congress intended to be citizens. The exclusion act of 1917 demonstrates conclusively that Congress intended that thenceforth no Hindu should enter the United States, much less be a citizen. Had this defendant left the United States, he could not re-enter—to such a point was he undesirable in the view of Congress. Where, then, are the indicia of intention that by remaining within our country he should be rewarded with the privileges of citizenship. The burden is on the alien to show such intention, and not upon the United States to show the absence of it.

Implied Amendment or Repeal

Legislation touching immigration and naturalization should be, and is, read together in order to determine the eligibility of aliens to citizenship. It is a familiar rule that no alien who has entered the United States in violation of the immigration laws can be naturalized. But an effort will be made in behalf of the defendant to establish the proposition that

when an alien has lawfully entered, later exclusion acts can not affect his eligibility to citizenship.

What is the present status of the Hindu who entered prior to 1917? This question is answered in *Fong Yue Ting vs. U. S.*, 149, U. S. 698-708:

"The foreigner not making part of the nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation."

Apply this to the Hindu here in question. After the exclusion act he continued to reside here as a matter of pure permission; he stayed on here by simple tolerance, which created no obligation. He continued to be an alien, and the stamp of undesirability put upon his kind by Congress, remained upon him. Shall he be allowed to squirm into citizenship through a hole between the statutes, which may be opened by a strict construction against the United States?

It will be contended for the Hindu that immigration and naturalization are distinct and unrelated subjects, and that legislation dealing with the immigrant can have no effect upon the applicant for citizenship. Such a view would be improper. The subject relates to the single idea of the transition of the alien from his native soil to American citizenship.

The primary purpose of allowing any immigration at all is to enrich the American nation—not in money or material resources, but in men. It is recognized that there are many aliens who, transplanted, would be splendid citizens. When they have come

and have proved their desirability, they are naturalized. The primary purpose of this also is to enrich the American nation—not in money or material resources, but in men. That immigration and naturalization have this common fundamental purpose is recognized by the language of Mr. Justice Shiras (*Wong Wing vs. U. S.*, 163 U. S. 228-237): “No limits can be put by the courts upon the power of Congress to protect . . . the country from the advent of aliens whose race or habits render them undesirable as citizens.”

In the transition of the alien to citizenship, he must pass through two doors, viz.: immigration and naturalization. They are successive points on the same road; they lead to the same end. Both lie between the alien and citizenship, but at different points in his progress. Immigration and naturalization are as like in their functions as the front and hind wheels of a wagon.

This identity of purpose is recognized in the title of the act of June 29, 1906, commonly known as the Naturalization Act (34 Stat. L. 596), “An act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States.” Each of the houses of Congress has a standing “Committee on Immigration and Naturalization” to which pertinent matters are referred.

Further evidence of this identity of purpose is given by the report of the House Committee on Immigration and Naturalization in submitting the Act

of February 5, 1917, when it said:

"The committee has labored earnestly in its efforts to keep out the most undesirable of those coming to our shores, and at the same time encourage the immigration of those who come to make their homes with us . . . and to become permanent citizens of our great government." (Vol. 1, House Reports, 64 Cong. 1st Sess. H. Rep. 95.)

Congress, then, has appointed two servants of the government to deal with aliens; the one is Immigration, and she stands at the door which is at the port of entry through which the alien must pass; and her sister is Naturalization, and she stands at the other door which opens upon full participation in the rights and duties of American citizenship, and her interpreter is the Court.

Congress, speaking of the Hindu, has said to Immigration: "This people is hateful in our sight and an abomination in the land; shut ye the door against them." Shall the courts now say to Naturalization, interpreting the words of Congress touching the Hindu: "This people is pleasing to our sight and a blessing to our nation; open ye the door to them; clothe them with the mantle of our citizenship"?

The rule is that repeals by implication are not favored, and **usually** occur only when there is such irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both. (Washington vs. Miller, 235 U. S. 422-428.)

Therefore, is the conflict irreconcilable? How can we reconcile the attitude of coldly turning our

back upon the Hindu without our gates, at the same moment cordially to open our arms to the Hindu within them? To do so certainly requires strict construction against the United States, and such construction is improper. Effect cannot reasonably be given to both these statutes. To hold there is no manifest repugnancy is to confer citizenship upon aliens clearly classed as undesirable for that privilege—it is bestowing citizenship upon a people whom Congress clearly does not mean to have that gift. As said in *Re Rustigian*, 165 Fed. 980-983, "It seems entirely **unreasonable** to hold that it was the intention of Congress to confer American citizenship upon an alien who is excluded by the immigration acts from admission to the country."

It will be argued that if Congress intended to prevent the naturalization of Hindus it would have said so, in terms. This is an argument for strict construction against the United States and in favor of the alien. This legislation is not in derogation of common right; there is no rule for this sort of strict construction (*U. S. vs. Rodgers*, 185 Fed. 334). No person who is denied admission to the United States can be naturalized. Congress could not more effectively prevent the naturalization of Hindus than it has done by closing the ports of entry to them, and the committee reports show that such was the intention.

But Congress did not say that those who had then entered should be deported; from that it will be ar-

gued that they should be naturalized. This again is strict construction against the United States and in favor of the alien; and the conclusion is not logical. The alien is seeking a gift—the privilege of citizenship. Because Congress has not said he must be deported, the Hindu who was here prior to 1917 may remain; but that is far from expressing an intention that he may also be naturalized. And it is beyond the proper function of the Courts to read such an intention into the statutes. As said by the Supreme Court in *U. S. vs. Ginsberg*, 243 U. S. 472-474:

“An alien who seeks political rights as a member of the nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is **rigidly to enforce the legislative will in respect to a matter so vital to the public welfare.**”

The courts may, therefore, examine the statutes and yield to the alien such concessions as are there expressed; but the courts may not, in the matter of citizenship, yield anything not expressed in the statute. The expressions of the statute should be examined as a matter “vital to the public welfare”—and that does not mean vital to the welfare of the alien. In case of doubt, such doubt ought to be resolved against the alien and in favor of the public welfare.

These considerations lead to the conclusion that the Hindu is not lawfully entitled to citizenship; and the application of Bhagat Singh Thind ought to have been denied. Therefore his certificate ought to be

cancelled as having been illegally procured, and there was error in the dismissal of the government's bill for such cancellation.

Respectfully submitted,

LESTER W. HUMPHREYS,
United States Attorney for Oregon.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH DISTRICT

UNITED STATES OF AMERICA,

Plaintiff, Appellant,

vs.

BHAGAT SINGH THIND,

Defendant, Respondent.

BRIEF OF RESPONDENT.

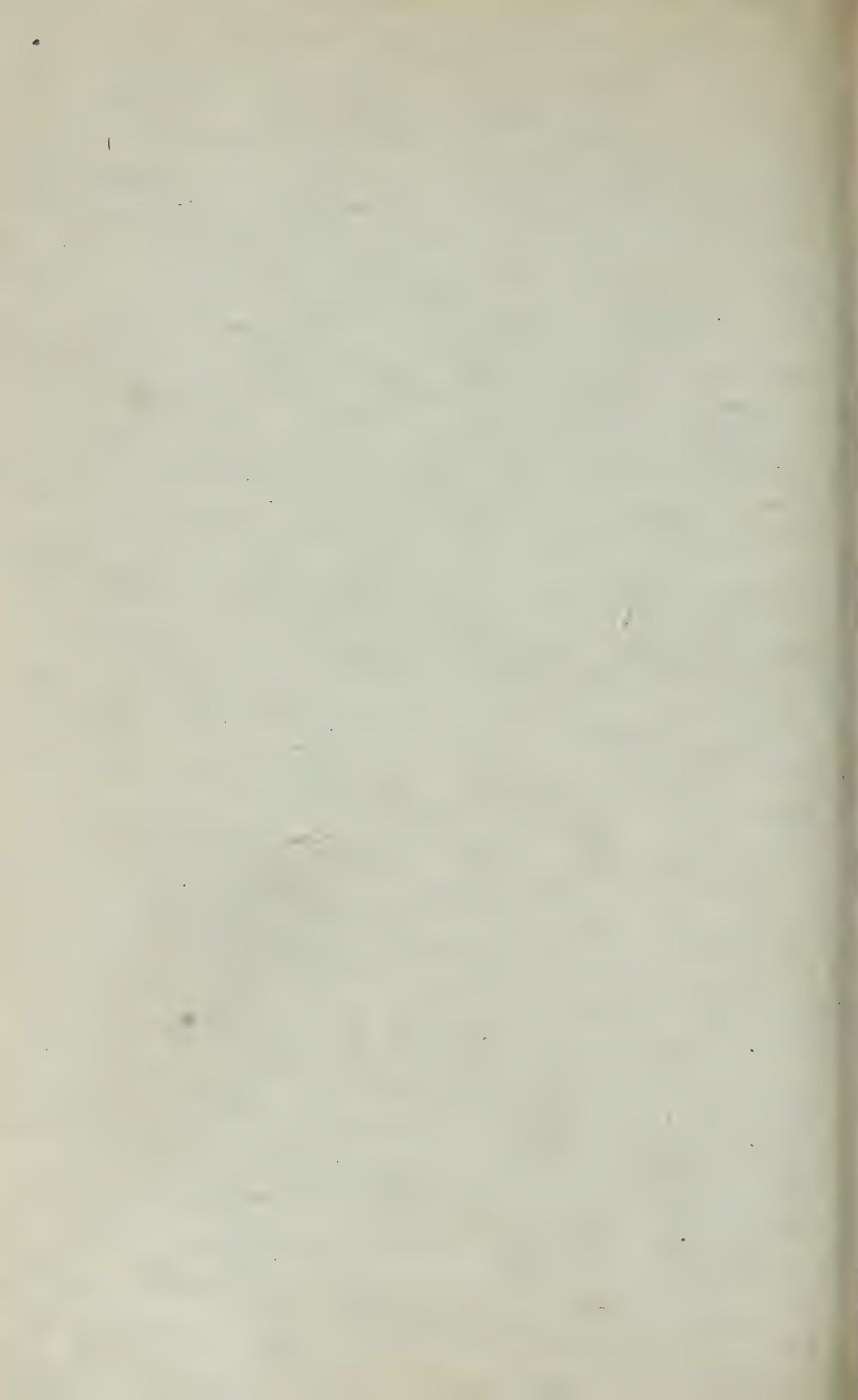
Upon Appeal from the United States Court
For the District of Oregon.

THOMAS MANNIX, *Attorney for Respondent.*

FILED

OCT 6 - 1933

F. D. MORGENTHAU



IN THE
United States Circuit Court of Appeals
FOR THE NINTH DISTRICT

UNITED STATES OF AMERICA,

Plaintiff, Appellant,

vs.

BHAGAT SINGH THIND,

Defendant, Respondent.

BRIEF OF RESPONDENT.

Upon Appeal from the United States Court
For the District of Oregon.

STATEMENT.

(1) As this case comes up on demurrer and as I believe Judge Wolverton has correctly stated both the facts and law, for the convenience of the Court I am going to print here the decision of Judge Wolverton, reported in 268 Fed. 683:

“The applicant is a high-caste Hindu, born in Amritsar, Punjab, in the northwestern part of India. He is 28 years of age, and was admitted into this country on July 4, 1913, at Seattle, Wash. He entered the army, and served therein for six months at Camp Lewis, and was accord-

ed an honorable discharge; his character being designated by the officer granting the discharge as "excellent." He was acting sergeant at the time of his discharge.

The testimony in the case tends to show that, since his entry into this country, the applicant's deportment has been that of a good citizen, attached to the Constitution of the United States, unless it be that his alleged connection with what is known as the Gadhr party or Gadhr Press, a publication put out in San Francisco, and the defendant Bhagwan Singh and others, prosecuted in the federal court in San Francisco for a conspiracy to violate the neutrality laws of this country, has rendered him an undesirable citizen. He was on friendly terms with Bhagwan Singh, Ram Chandra, and others who had to do with the Gadhr Press, and, after Bhagwan Singh's conviction, while the latter was on his way to the penitentiary at McNeil Island, met him at Portland, at the depot, and subsequently visited him at the penitentiary three or four times.

He stoutly denies, however, that he was in any way connected with the alleged propaganda of the Gadhr Press to violate the neutrality laws of this country, or that he was in sympathy with such a course. He frankly admits, nevertheless, that he is an advocate of the principle of India for the Indians, and would like to see India rid of British rule, but not that he favors an armed revolution for the accomplishment of this purpose. Obviously, he has modified somewhat his views on the subject, and now professes a genuine affection for the Constitution, laws, customs, and privileges of this country.

Were his allegiance to the laws and customs of this country dependent upon his protestations alone, I should not be inclined to give them credence. They are, however, strongly corroborated by disinterested citizens, who are most favorably impressed with his deportment, and manifestly believe in his attachment to the principles of this government. I have not attempted to analyze the testimony critically, because of its length, but, from a careful survey of it, I am impressed that his deportment here entitled him to become a citizen, unless it be that he is debarred from citizenship under the naturalization and immigration laws of Congress.

I am not disposed to discuss the question as one of first impression whether a high-class Hindu, coming from Punjab, is ethnologically a white person, within the meaning of Section 2169 of the Revised Statutes, as amended (Comp. St. sec. 4358). I am content to rest my decision of the question upon a line of cases of which *In re Mohan Singh* (D. C.) 257 Fed. 209, *In re Halladjian* (C. C.) 174 Fed. 834, and *United States vs. Balsara*, 180 Fed. 694, 103 C. C. A. 660, are illustrative. I am aware that there are decisions to the contrary, but am impressed that they are not in line with the greater weight of authority.

A crucial question presented is whether the third section of the Immigration Act of Congress of February 5, 1917 (39 Stat. 874, 875, (Comp. St. 1918, Comp. St. 1918, Comp. St. Ann. Supp. 1919, Sec. 4289 $\frac{1}{4}$ b), operates as a repeal of section 2169, R. S., in so far as it embraces the words "white persons." Section 3 excludes Hindus from admission into this country by territorial

delimitations. The act became effective May 1, 1917. Subsequently thereto, it became unlawful for a Hindu to enter the United States, and it may be confidently affirmed that no person who entered the United States unlawfully can be admitted to citizenship therein.

Bhagat Singh did not enter unlawfully. He came at a time when he had a right to enter, and was permitted to enter in pursuance of law. The act in question does not purport to disturb his present domicile here, nor does it impose any further duty upon him by which he may maintain such a domicile. Neither does it require of him that he shall depart the country. Furthermore, I find nothing in the act that evinces an intentment that it should operate retrospectively; that is, to render his lawful entry presently unlawful. We may inquire, then, respecting the status of Hindus lawfully domiciled in this country. Shall they remain here as they please, without the privilege of becoming citizens, or shall they be deported whence they came? If the latter, how and when. As to these questions, the law is silent, unless section 2169 and the naturalization laws are still applicable.

Repeals by implication are not favored, and, unless there is manifest repugnancy between the latter and the former act, the former must remain operative. The argument is that, as Congress eliminated the words "white persons" from the Immigration Act, the act in question, it must be inferred that it intended to eliminate these words also from section 2169, and thus to amend that section accordingly. This does not necessarily follow. Congress was dealing with the subject of

immigration, and not naturalization, and it may well be that Congress designed thenceforth to exclude Hindus from entry into the United States, and still permit such as were domiciled here the privilege of being naturalized. In this light, I see no repugnancy between the act and section 2169 and other naturalization regulations.

I see no analogy in this act to the Chinese Exclusion Act. To illustrate, by the sixth section of the Act of May 5, 1892 (27 Stat. 25, (Comp. St. sec. 4320), it was made the duty of Chinese laborers within the limits of the United States at the time of the passage of the act, and who were entitled to remain therein, to apply to the collector of internal revenue of their respective districts, within one year, for certificates of residence; and it was further provided that any Chinese laborer who neglected or refused to comply with the provisions of the act, or who, after one year from its passage, was found within the United States without such certificate, should be deemed and adjudged to be unlawfully therein, and should be deported accordingly. This statute has been sustained, and the courts have held that the United States can forbid aliens coming within their boundaries and expel them from their territory. *Wong Wing v. United States*, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140.

So it has been held that a certificate issued to a Chinese laborer, under the fourth and fifth sections of the Act of May 6, 1882 (22 Stat. 58), as amended July 5, 1884 (28 Stat. 115), conferred upon him no right to return to the United States of which he could not be deprived by a

subsequent act of Congress. *Chae Chan Ping v. United States*, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068. This case is illustrative.

The present act, however, does not deal with the Hindus and other races without the delimitations other than to debar their further admission into this country. It does not require such as are here to depart, and there being no manifest repugnancy between this and the naturalization laws, it must be concluded that Bhagat Singh is entitled to his naturalization."

It would seem that a majority of the courts are in accord with the foregoing opinion.

(2) In *United States v. Balsara* (Second Cir.), 180 Fed. 694, Circuit Judge Ward, in the case of a Parsee, said:

On the other hand, counsel for Balsara insist that Congress intended by the words "free white persons" to confer the privilege of naturalization upon members of the white or Caucasian race only. This we think the right conclusion and the one supported by the great weight of authority. In re Ah Yup, 5 Sawy. 155, Fed. Cas. No. 104; In re Saito (C. C.), 62 Fed. 126; In re Camille (C. C.), 6 Fed. 256; Matter of San C. Po., 7 Misc. Rep. 471, 28 N. Y. Supp. 383; In re Buntaro Kumagai (D. C.), 163 Fed. 922; In re Knight (D. C.), 171 Fed. 297; In re Najour (C. C.), 174 Fed. 735; In re Halladjian (C. C.), 174 Fed. 834."

In *re Mohan Singh*, 257 Fed. 209, District Judge Bledsoe in naturalizing a Hindu said:

"Congress intended by the words 'free white

*persons' to confer the privilege of naturalization upon members of the white or Caucasian race only. * * * * Modern ethnologists use the terms 'white' and 'Caucasian' synonymously and interchangeably. Seemingly the preponderance of respectable opinion includes the Hindus of India as members of the Aryan branch or stock of the so-called Caucasian or white race. * * * * I am advised by counsel for petitioner herein and the statement is not challenged by the Government, that Hindus have been admitted to citizenship in the Southern District of Georgia, the Southern District of New York, the Northern District of California and the Eastern District of Washington by the courts of the United States and by the Superior Court of California in both San Francisco and Los Angeles."*

In *re Mozumdar*, 207 Fed. 115, District Judge Rudkin, in granting naturalization to a Hindu in the District Court of the United States for the Eastern District of Washington, said:

"But whatever the original intent may have been, it is now settled by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only."

In *Dow v. United States*, 226 Fed. 145, (Fourth Cir.), involving the naturalization of a Syrian, it is stated in the head note:

"The term 'white persons,' as used in Rev. St. Sec. 2169 (Naturalization Act, March 26, 1790, c. 3, 1 Stat. 103, as amended by Act Feb. 18, 1875, c. 80, sec. 1, 18 Stat. 318 (Comp. St.

1913, sec. 4358), *authorizing the naturalization of aliens being 'free white persons,' is not to be construed according to its import in 1790, and, in view of the course of legislative discussion and enactment, includes a Syrian.*"

In the same case the lower court held that the meaning of "free white persons" in the statute was free white persons of European habitancy or descent, but the Circuit Court of Appeals on review did not take this view of the statute.

In the case of *In re Mudarri*, 176 Fed. 465, Circuit Judge Lowell naturalized a Syrian on the ground that he was a member of the Caucasian or white race and the same judge in the *Halladjin* case, 174 Fed. 834, naturalized an Armenian for the same reason.

District Judge Newman in Georgia, in the case of *In re Najour*, 174 Fed. 735, naturalized a Syrian on the ground that he was white or a Caucasian.

Judge Wolverton, in *In re Ellis*, 179 Fed. 1002, also naturalized a Syrian on the ground that he was a Caucasian or white person. There Judge Wolverton said:

"The most reasonable inference would be that the word 'white,' ethnologically speaking, was intended to be applied in its popular sense to denote at least the members of the white or Caucasian race of people."

Other courts, for instance in *In re Singh*, 246 Fed. 496, and the lower court opinion in *In re Dow*, 211 Fed. 486 and 213 Fed. 355, which cases were re-

versed by the Circuit Court of Appeals, in 226 Fed. 145, go on the theory that the words "free white persons" should be used in a restrictive and geographical sense.

It is not clear in the present case just what the Government's theory is. It seems to rely largely on the reasoning of the overruled cases above, that is *In re Dow*, 211 Fed. 486 and 213 Fed. 355.

It will be seen from the foregoing decision that the weight of authority is in favor of the admission of Hindus to citizenship.

(2) A great majority of the cases hold that the term "free white persons" relates to members of the Caucasian race generally and is not a matter of geography. The cases relied upon by the Government would make race a matter of geography and would relegate the meaning of the statute to its supposed meaning on March 26, 1790, when it was enacted. At that time the American people were composed almost entirely of English, Irish, Scotch, Germans and Swedes. Since that time, however, the complexion of the American race has changed by immigration, and citizenship has been extended to all sorts of races of white persons, including Jews, who are certainly an Asiatic race, and also Syrians and Armenians, so that no geographical classification is possible for one does not lose his race by changing his habitat. Race is a matter of blood and descent—not a matter of residence.

Whatever may have been the origin of the word

“Caucasian,” and I think it was originated by a German named Blumenbach, who applied the term to some race of people who lived near the Caucasus Mountains and who were supposed by him to be the highest type of the white race; the word has by usage received a well-defined meaning so that every schoolboy in America understands that the word “Caucasian” applies to members of the white race, irrespective of geography. As already pointed out, the naturalization statute has not been construed by the more reasonable authorities in any geographical sense, but in a racial sense.

The question resolves itself into whether a Hindu is a member of the white or Caucasian race. The greater number of legal authorities answer the question in the affirmative.

Historically, it appears that in pre-historic times a certain white race of people called Aryans lived in Central Asia and sometime about the year 2000 B. C. a part of this Aryan race went southward to India and conquered the Dravidian natives, who were a race somewhat akin to the aboriginal Australians, and who were entirely distinct from their Aryan conquerors. This fact is attested to by all the histories dealing with the Aryan race and with India. See *Historians' Hist. World*, Vol. 2, pages 475, 482

Apart from history comes the proof of philology. It has been discovered by persons versed in the genesis of languages, that practically all the modern

European languages and the Sanskrit language have a common Aryan root and this is circumstantial evidence of the very highest order, for if the Hindu speaks a language similar to the European languages, all having a common root, it proves that back in the mists of pre-historic times the present Hindu race must have been associated with the ancestors of the present European race in one community or nation where a common language was used, namely, the parent language of the Aryan race. If there was an Aryan language, which is proved by philology, there must have been an Aryan race. The language could not exist without the race. One proves the existence of the other. See *Ency. Britannica*, Vol. 2, page 115; Huxley, *Man's Place in Nature*, 272; Freeman, *Race and Language*, Harvard Classics, Vol. 28, page 235.

Many scientists have attempted to show that similarity of language does not prove similarity of race. Of course this is true in some cases, as, for instance, the American negro, although speaking the English language, could not be classed as a Caucasian. But we know that the American negro belonged to a subject race and acquired the English language from those who subjected him, while in the case of the Hindu history shows that he has never been subjected by any race of conquerors who materially changed his language up to the time when Lord Clive in the battle of Plassey won India for the British Empire. So that in the case of the Hindu philology connected with the historical facts of the case reasonably establishes racial identity between the Hindu and the white European.

From the viewpoint of ethnology, that is, taking the Hindu and comparing his physical structure with that of the white Englishman or Scotchman, we find the same physical traits. If a Hindu of the Aryan race was light in color he would pass in London for an Englishman, so far as his appearance is concerned.

We all know that a hot sun will blacken any race. We find the Finns who live in the most northern part of Europe to be the lightest-colored in Europe, although they are supposed to be Mongolians, and as we go further south in Europe we find the races become darker until we finally find the Moor, of whom Iago spoke.

All the conflicting views of the ethnologists and philologists are very interesting and very confusing. Lawyers probably are better acquainted with the value of circumstantial evidence than these ethnologists, philologists, or college professors. At least they must make a more practical application of the rules of circumstantial evidence, and as a matter of circumstantial evidence or induction, taking the Hindu from a historical, philological and ethnological point of view there is no reasonable doubt about his identity as a white man, a little sunburned, it is true, but nevertheless a white man. In all cases of circumstantial evidence it is a case of weighing probability against probability and accepting the more reasonable hypothesis.

The cases cited above contain most all the philological and ethnological arguments on this subject.

Probably Huxley and Max Mueller, together with the Encyclopedia Britannica throw the most light on the subject, and it is not my purpose to lengthen this brief further on this phase of the case.

This particular Hindu is a high-class man in every respect, a veteran of the late war and a volunteer, who received high commendation from his superior officers for his distinguished services. His personal desirability is therefore apparent and as a general proposition a man who fights for the flag should be entitled to come under the flag. His love for America is evidenced by his conduct. To reverse this case would result in the disenfranchisement of a great number of Hindus in all parts of the Pacific Coast and other parts of the United States.

Judge Wolverton, Judge Rudkin and Judge Bledsoe, all under the jurisdiction of the Circuit Court of Appeals of this circuit, have already admitted Hindus to citizenship after an exhaustive study of the subject, and while this may be an argument *ad hominem*, nevertheless, their opinions are entitled to the most respectful consideration.

(3) As to the Immigration Act touching Hindus, the Naturalization Act and the Immigration Act relate to two entirely different subjects and for that reason alone there could be no amendment to the Naturalization Act by implication.

These two statutes are not *in pari materia*. Statutes are *in pari materia* which relate to the

same subject matter. When statutes are *in pari materia*, they are to be construed together, but when they are not *in pari materia*, they do not relate to the same subject matter and cannot be construed together. (See Words and Phrases, Vol. 4, page 3478.)

In *United States v. Claflin*, 97 U. S. 546, 24 L. Ed. 1082, it is held that in order to repeal a statute by implication, the subject of the statutes must be the same, and even if the statutes are *in pari materia*, there shall be no repeal in the absence of express words, unless the implication of repeal is necessary.

Wilnot v. Mudge, 103 U. S. 217; 26 L. Ed. 536.

Repeals of statutes by implication are not favored and are never admitted where the former can stand with the new act, but only where there is a positive repugnancy between the statutes, or the latter is plainly intended as a substitute for the former.

U. S. v. 67 Pack, of Dry Goods, 17 How. 85; 15 L. Ed. 54.

Washington v. Miller, 235 U. S. 422; 59 L. Ed. 295.

See also to the same point: *Supervisors v. Lackawanna*, 93 U. S. 619; *Arthur v. Homer*, 96 U. S. 137; *Movins v. Arthur*, 95 U. S. 144.

It is further held that a later act will not be held to repeal a prior act unless there is a positive

repugnancy between the provisions of the new law and the old, and even then only to the extent of such repugnancy.

U. S. v. Mathews, 173 U. S. 381; 43 L. Ed. 738.

Section 2169 Revised Statutes reads as follows:

“The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent.”

According to the contention of counsel the act to regulate the immigration of aliens to and the residence of aliens in the United States enacted in 1917 would repeal and amend this act so that it would contain the provision excluding free white persons from the different countries in Asia. Such a contention in the view of the foregoing authorities cannot be sustained.

The Immigration Act prohibits the immigration of idiots, imbeciles, insane persons, drunkards, paupers, vagrants and people suffering from tuberculosis and other diseases and also prohibits the immigration of Asiatics. Let us suppose for instance that a person afflicted with tuberculosis came to this country in 1910, or any other year prior to 1917 and applied for naturalization, would the fact that he belonged to a class that could not be admitted into the United States because of the Act of 1917 prevent him from becoming naturalized? The mere statement of the proposition shows its absurdity.

There is no provision in the Naturalization Act itself to prevent persons afflicted with tuberculosis, or epilepsy, or even chronic alcoholism, from becoming American citizens, and the fact that this class of persons are precluded from coming into the United States by the law of 1917 would not prevent persons of these classes from becoming citizens of the United States under the Naturalization Laws, if they came to the United States prior to 1917, and were otherwise qualified.

The same reasoning applies to Hindus. If a Hindu came to the United States prior to 1917 he would at least be in the same category, as far as the Immigration Law is concerned, with a consumptive person. Speaking figuratively he would be afflicted with the disease which might be termed "Hindooism," which disease would keep him out of the country under the law of 1917, but which would not preclude him from becoming a citizen of the United States if he came into the country before that time.

There is nothing in the Immigration Act which in any way impinges upon the Naturalization Act. If Congress had intended to interfere with the citizenship of Hindus, they would have said so. There is no Hindu naturalization exclusion act and we cannot create one by implication merely for the purpose of denying Bhagat Singh of citizenship. The Immigration Act of 1917 only affects Hindus who attempt to come to this country after that time. If

a Hindu or a consumptive, or a drunkard, or any of the other classes enumerated in the act have attempted to enter the United States since 1917, in violation of the act they may be deported or otherwise punished, as provided by the act. Any person who comes to the United States in violation of the Immigration Act of 1917, commits a crime against the United States and obviously could not become a citizen for that reason.

Therefore, the naturalization of aliens who came to the United States prior to 1917 is not affected by the Immigration Act. The purpose of the Immigration Act was prospective and not retroactive. A law cannot be presumed to be retroactive and there is nothing in the Immigration Act which makes it retroactive. In any of the naturalization cases heretofore tried, so far as known, this point has not been raised. We suppose for the reason that it is too plain for argument that neither the Naturalization Act or the Immigration Act in any way interfere with each other, nor is either act affected or modified by the other. It follows from this that Section 2169 is in full force and effect and if it is in full force and effect the Immigration Statute cannot be considered in connection therewith.

We therefore respectfully petition your Honorable Court for the affirmance of District Judge Wolverton's judgment, granting citizenship to your respondent.

Respectfully submitted,

THOMAS MANNIX,

Counsel for Respondent.

Sept, 26, 1921.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN SAMLIN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

FILED
AUG 8 1910
U. S. DISTRICT COURT
DISTRICT OF MONTANA

United States
Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

FRANK HUNTER, Esq., of Miles City, Montana,
and

Messrs. McINTIRE & MURPHY, of Helena,
Montana,

Attorneys for Defendant and Plaintiff in
Error.

JOHN L. SLATTERY, Esq., U. S. Attorney,

RONALD HIGGINS, Esq., Asst. U. S. Attorney,

W. H. MEIGS, Esq., Asst. U. S. Attorney, all of
Helena, Montana,

Attorneys for Plaintiff and Defendant in
Error. [1*]

In the District Court of the United States in and
for the District of Montana.

No. 3805.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN SAMLIN,

Defendant.

BE IT REMEMBERED that on May 7, 1921,
an information was duly filed herein, being in the
words and figures following, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript
of Record.

In the District Court of the United States, District of Montana.

Information.

United States of America,
District of Montana,—ss.

BE IT REMEMBERED, that George F. Shelton, United States Attorney for the District of Montana, who for the said United States, in its behalf, prosecutes in his own person, comes here into the District Court of the United States for the District of Montana, on the 7th day of May, 1921, in the February, 1921, term of said court, held at the city of Butte, in the State and District of Montana, and for the United States of America, gives the Court to understand and be informed:

That on or about the 19th day of March, 1921, one John Samlin, whose true name is to the informant unknown, in the State and District of Montana, and within the jurisdiction of this court, at 211 N. 6th St., in the city of Miles City, County of Custer, in said State and District of Montana, did then and there maintain a common nuisance, that is to say, a building where intoxicating liquor, to wit, whiskey, was kept and sold, in violation of Title II of the National Prohibition Act, the maintaining of said common nuisance being then and there prohibited and unlawful; contrary to the form of the statute in such case made and pro-

vided, and against the peace and dignity of the United States of America.

GEORGE F. SHELTON,
United States Attorney, District of Montana.

[3]

United States of America,
District of Montana,—ss.

George F. Shelton, being first duly sworn, on oath deposes and says:

That he is a duly appointed, qualified and acting United States Attorney for the District of Montana, and as such makes this verification to the foregoing information; that he knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

GEORGE F. SHELTON.

Subscribed and sworn to before me this 7th day of May, 1921.

H. H. WALKER,
Deputy Clerk U. S. District Court, District of Montana.

Filed May 7, 1921. C. R. Garlow, Clerk. [4]

Thereafter, on June 15th, 1921, defendant was duly called for arraignment, the record thereof being as follows, to wit:

No. 3805.

UNITED STATES.

vs.

JOHN SAMLIN.

Arraignment.

Defendant was duly called for arraignment this day, whereupon Frank Hunter, Esq., asked that his name be entered as attorney for defendant, and it was so ordered. Thereupon counsel was granted leave to file motion to quash, which was set for hearing at 10 A. M. to-morrow.

Entered in open court June 15th, 1921.

C. R. GARLOW,
Clerk. [5]

Thereafter, on June 16th, 1921, plea of not guilty was duly entered herein, the record thereof being as follows, to wit:

No. 3805.

UNITED STATES

vs.

JOHN SAMLIN.

Plea of Not Guilty.

This cause came on regularly for hearing this day on motion to suppress certain evidence, J. L. Slattery, Esq., U. S. Attorney, appearing for plaintiff and Frank Hunter, Esq., appearing for the defendant. Thereupon the motion was argued and submitted, whereupon the Court, after due consideration, ordered that said motion be denied. Thereupon a plea of not guilty was entered on behalf of said defendant, the case is to be tried in July.

Entered in open court June 16th, 1921.

C. R. GARLOW,
Clerk. [6]

Thereafter on July 13th, 1921, the cause came on regularly for trial, the record thereof being as follows, to wit:

No. 3805.

UNITED STATES

vs.

JOHN SAMLIN.

Trial.

This cause came on regularly for trial this day, defendant being present with his attorneys, H. G. Murphy, Esq., and Frank Hunter, Esq., and J. L. Slattery, Esq., U. S. Attorney, appearing for the United States. Thereupon the following were duly impaneled, accepted and sworn as a jury to try the cause, viz.: P. J. Kelly, John W. Fulton, F. A. Rodgers, Charles Oliver, G. W. Stribe, William E. Trenary, Charles F. Olson, John Webster, W. C. Irwin, Jacob Fischer, J. E. W. Clarke and Leo Rheim. Thereupon T. R. Gordon, C. S. Hanna, Geo. W. Farr, R. B. Hayes and H. M. Dengler were sworn and examined as witnesses for plaintiff and plaintiff's exhibits, being two bottles and contents, introduced, whereupon plaintiff rested. Thereupon John Samlin and Helen Hogan were sworn and examined as witnesses for defendant, whereupon the evidence being closed, after the arguments of coun-

sel and the instructions of the Court, the jury retired to consider of its verdict. Thereafter the jury returned into court with its verdict, which was received by the Court and ordered filed and read, and being as follows, to wit: "We, the jury in the above-entitled cause, find the defendant guilty of the unlawful sale of intoxicating liquor, to wit, whiskey, on the 11th and 19th of March, 1921. Jacob Fischer, Foreman.

Thereupon on motion of defendant, Court ordered time for sentence continued until 9:30 A. M. tomorrow.

Entered in open court July 13th, 1921.

C. R. GARLOW,
Clerk. [7]

Thereafter, on July 13, 1921, verdict was duly filed herein, being as follows, to wit:

In the District Court of the United States, District
of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN SAMLIN,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find the defendant guilty of the unlawful sale of intoxicat-

ing liquor, to wit, whiskey, on the 11th and 19th of March, 1921.

JACOB FISCHER,

Foreman.

Filed July 13th, 1921. C. R. Garlow, Clerk.

Thereafter, on July 14, 1921, judgment was duly entered herein, being in the words and figures following, to wit: [8]

In the District Court of the United States, District of Montana.

No. 3805.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN SAMLIN,

Defendant.

Judgment.

The United States Attorney with the defendant and his counsel present in court.

The defendant was thereupon duly informed by the Court of the nature of the charge against him as appears in the information herein, and of his arraignment, and plea of not guilty, and of his trial and the verdict of the jury of guilty of the unlawful sale of intoxicating liquor, to wit, whiskey.

And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he

had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendant having been duly convicted in this court of the offense of unlawfully selling intoxicating liquor, to wit, whiskey, in violation of the National Prohibition Act, committed on the 11th and 19th days of March, 1921, at Miles City, in the State and District of Montana.

It is therefore **CONSIDERED, ORDERED, AND ADJUDGED** that for said offense you, the said John Samlin, be confined and imprisoned in the county jail at Helena, Montana, for the term of five months and that you pay the costs taxed at \$97.44.

Judgment rendered and entered July 14th, 1921.

C. R. GARLOW,

Clerk.

Filed July 14th, 1921. C. R. Garlow, Clerk. [9]

Thereafter, on July 18th, 1921, petition for writ of error was filed herein as follows, to wit:

In the District Court of the United States, for the
District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN SAMLIN,

Defendant.

Petition for Writ of Error.

To the Honorable GEORGE M. BOURQUIN,
United States District Judge of the District
Court Aforesaid:

Now comes John Samlin by his attorney and respectfully shows that heretofore on the 13th day of July, 1921, he was convicted in the above-entitled court and cause by a jury for an alleged violation of the National Prohibition Law and thereafter on the 14th day of July, 1921, judgment was by said Court rendered and entered against him upon the verdict of said jury.

And your petitioner feeling himself aggrieved by the said verdict and judgment entered herein as aforesaid, herewith petitions this Honorable Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under and in pursuance of the laws of the United States in said cases made and provided.

WHEREFORE, the premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit sitting at the city of San Francisco, in the State of California, for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by petitioner in error, conditioned as the law directs, [10] and upon giving such bond as may be required, that all further proceedings may be sus-

pended until the determination of said writ of error by the Circuit Court of Appeals of the United States for the Ninth Circuit, as aforesaid, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals aforesaid, and your petitioner will ever pray.

JOHN SAMLIN,

Petitioner in Error.

FRANK HUNTER,

McINTIRE & MURPHY,

Attorneys for Petitioner in Error.

Filed July 18, 1921. C. R. Garlow, Clerk. [11]

Thereafter, on July 18th, 1921, assignment of errors was filed herein as follows, to wit:

In the District Court of the United States, for the
District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN SAMLIN,

Defendant.

Assignment of Errors.

Comes now John Samlin, the defendant above named, by his attorneys, and in connection with his petition for a writ of error makes the following assignment of errors which he alleges occurred upon the trial of said cause and upon which he relies to

reverse the judgment against him and in favor of plaintiff herein rendered on the 14 day of July, 1921, in the above-entitled court and cause.

I.

That the verdict of the jury is contrary to law.

II.

That the verdict of the jury herein finds defendant guilty of a crime not alleged in the information herein.

III.

That the information herein charges the defendant with having on or about the 19th day of March, 1921, in the State and District of Montana, and within the jurisdiction of said court, at 211 North Sixth Street in the city of Miles City, county of Custer, in said State and District of Montana, maintained a common nuisance, that is to say, a building wherein intoxicating liquor, to wit, whiskey, was kept and sold in violation of Title II of the National Prohibition Act, and the jury by its verdict in the [12] above-entitled court and cause found defendant guilty of selling whiskey in violation of the National Prohibition Act, and the judgment rendered and entered herein on said verdict convicts defendant of the crime of selling whiskey in violation of the National Prohibition Act, of which crime he was so found guilty by said verdict and the judgment of the court said defendant was not on trial nor charged therewith.

IV.

That the Court erred in entering judgment herein

in favor of the United States and against the defendant.

V.

That the Court erred in pronouncing sentence upon said defendant and rendering and entering judgment against him herein.

VI.

That the Court erred in not discharging defendant after it received the verdict of the jury herein.

WHEREFORE said John Samlin prays that said judgment in favor of the plaintiff and against said defendant be reversed and set aside and the District Court aforesaid be directed to enter judgment in favor of defendant and against the United States and dismiss said cause.

FRANK HUNTER,

McINTIRE & MURPHY,

Attorneys for Defendant.

Filed July 18, 1921. C. R. Garlow, Clerk. [13]

Thereafter, on July 18th, 1921, order allowing writ of error and fixing bond was filed herein, as follows, to wit:

In the District Court of the United States, for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN SAMLIN,

Defendant.

Order Allowing Writ of Error and Fixing Bond.

Upon motion of McIntire and Murphy, the attorneys for the above-named defendant, and upon the filing of a petition for a writ of error and an assignment of errors,—

IT IS HEREBY ORDERED that writ of error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that a transcript of the records, proceedings and papers in this cause duly authenticated be sent to the said United States Circuit Court of Appeals for the Ninth Circuit and that the amount of the bond on said writ of error to be furnished by the said defendant be and the same is hereby fixed at the sum of Five Hundred Dollars (\$500.00), and upon due execution and approval of said bond the same shall amount as supersedeas herein pending proceedings upon said writ of error in said Circuit Court of Appeals.

Dated Helena, Montana, this 18th day of July, 1921.

BOURQUIN,
Judge.

Filed July 18, 1921. C. R. Garlow, Clerk. [14]

Thereafter on July 18th, 1921, bond on writ of error was filed herein, as follows, to wit:

In the District Court of the United States, for the
District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN SAMLIN,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, John Samlin, as principal, and A. L. Smith, and W. H. Dickinson, of the city of Helena, county of Lewis and Clark, State and District of Montana, as sureties, are held and firmly bound to the United States of America in the full and just sum of Five Hundred Dollars (\$500.00), lawful money of the United States, to be paid to the said United States of America, for which payment well and truly to be made we bind ourselves, our executors, administrators, heirs and assigns, jointly and severally by these presents.

Signed and sealed this 18th day of July, 1921.

WHEREAS lately at a term of the District Court of the United States for the District of Montana sitting at Helena in said District in a suit pending in said court in which the United States of America is plaintiff, and said John Samlin, defendant, being cause numbered 3805, in which the said defendant was charged with maintaining a nuisance in viola-

tion of the National Prohibition Act, and upon a trial thereof and a verdict of guilty was returned by a jury and judgment was rendered against said defendant by the court that said defendant be imprisoned in the common jail of Lewis and Clark County, Montana, for a period of five months and to pay the costs of suit, and the said John Samlin has [15] or is about to file in said court his petition for and obtain a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, and obtain a citation directed to the United States of America citing it to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, in the State of California, according to law within thirty days from the date thereof.

NOW, THEREFORE, the condition of this obligation is such that if the said John Samlin shall prosecute his writ of error to effect and pay the said judgment for costs and surrender himself in execution of the judgment heretofore entered herein against him and pay the costs and damages of the United States of America in said Circuit Court of Appeals, in the event that he fails to make his plea good on said writ of error, or on a dismissal thereof, then the above obligation to be void; otherwise to remain in full force and effect.

JOHN SAMLIN.

A. L. SMITH.

W. H. DICKINSON. [16]

State of Montana,
County of Lewis and Clark,—ss.

A. L. Smith and W. H. Dickinson, being first duly sworn, each for himself, deposes and says: That he is a resident and freeholder within the County of Lewis and Clark, State and District of Montana; that he is worth the amount of one thousand dollars (\$1,000.00), which is double the sum specified in the foregoing bond as the penalty thereof, over and above all his just debts and liabilities exclusive of property exempt from execution. W. H. Dickinson, freeholder in Jefferson County, Montana.

A. L. SMITH.

W. H. DICKINSON.

Subscribed and sworn to before me this 18th day of July, 1921.

[Notarial Seal] HOMER G. MURPHY,
Notary Public for the State of Montana, Residing
at Helena, Mont.

My commission expires Mch. 28, 1923.

United States of America,
District of Montana,—ss.

I, Julius Brass, United States Commissioner, do hereby approve the foregoing bond as to the sufficiency of the sureties therein mentioned.

[Seal]

J. H. BRASS,
United States Commissioner.

Filed July 18, 1921. C. R. Garlow, Clerk. [17]

Thereafter on July 18th, 1921, writ of error was duly issued herein, which original writ is hereto annexed and is in the words and figures following, to wit: [18]

In the District Court of the United States, for the
District of Montana,

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN SAMLIN,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America to the United States of America, Defendant in Error, and the Honorable John L. Slattery, United States Attorney for the District of Montana, Its Attorney, GREETING:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said District Court before you between the United States of America, plaintiff, and John Samlin, defendant, a manifest error has happened to the damage of said John Samlin as by his complaint and petition appears, and we being willing that error, if any hath been, should be corrected and full and speedy justice be done to the aforesaid parties in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the

same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held, and the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein according to law what [19] of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 18th day of July, 1921.

[Seal]

C. R. GARLOW,

Clerk of the United States District Court, District of Montana. [20]

Answer of Court to Writ of Error.

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of the said District Court of the United States, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within

contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court:

[Seal]

C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy. [21]

[Endorsed]: No. 3805. In the District Court of the United States for the District of Montana. United States vs. John Samlin. Writ of Error. Filed July 18th, 1921. C. R. Garlow, Clerk. [22]

Thereafter, on July 19th, 1921, citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [23]

In the District Court of the United States, for the
District of Montana,

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN SAMLIN,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America to the United States of America, Defendant in Error, and the Honorable John L. Slattery, United States Attorney for the District of Montana, Its Attorney, GREETING: .

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Montana, wherein John Samlin is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Dated this 19th day of July, 1921.

BOURQUIN,

Judge. [24]

Due service of within citation and receipt of copy thereof this 19th day of July, 1921, is hereby admitted and acknowledged.

W. H. MEIGS,

Asst. U. S. Attorney.

[Endorsed]: No. 3805. In the District Court of the United States, for the District of Montana. United States of America, Plaintiff, vs. John Samlin, Defendant. Citation on Writ of Error. Filed July 19, 1921. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [25]

Thereafter on July 19th, 1921, praecipe for transcript was filed herein, being as follows, to wit:

In the District Court of the United States, for the
District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN SAMLIN,

Defendant.

Praecipe for Transcript of Record.

To C. R. Garlow, Clerk of the Above-entitled Court:

You will please make up the transcript on writ of error of the above-entitled defendant and plaintiff in error herein, taking care that the same is a true and complete record, containing in itself and not by reference all papers and other proceedings which are necessary to the hearing in the United States Circuit Court of Appeals for the Ninth Circuit, and to that end including therein:

1. The judgment-roll in the above-entitled cause, including the information, clerk's minute entry of the defendant's arraignment and plea; minutes of the court during the trial of said cause; the verdict of the jury; the judgment.
2. Petition for writ of error.
3. Assignment of errors.
4. Order allowing writ of error.
5. Bond of defendant.
6. Writ of error.

7. Citation on writ of error.
8. Answer of court to writ of error.
9. Clerk's certificate.

And all other papers and documents necessary to a complete [26] record in said writ of error.

Dated this 18th day of July, 1921.

FRANK HUNTER,
McINTIRE & MURPHY,

Attorneys for Defendant.

Due service of within praeceipe and receipt of copy thereof this 19th day of July, 1921, is hereby admitted and acknowledged.

W. H. MEIGS,
Attorney for U. S.

Filed July 19, 1921. C. R. Garlow, Clerk. [27]

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 28 pages, numbered consecutively from one to 28, inclusive, is a full, true and correct transcript of the record and all proceedings had in said cause, and the whole thereof, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have an-

nexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Seven and 40/100 Dollars (\$7.40), and have been paid by the plaintiff in error.

Witness my hand and the seal of said court at Helena, Montana, this 3d day of August, A. D. 1921.

[Seal]

C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy. [28]

[Endorsed]: No. 3746. United States Circuit Court of Appeals for the Ninth Circuit. John Samlin, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed August 8, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

JOHN SAMLIN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR
UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE DIS-
TRICT OF MONTANA.

McINTIRE & MURPHY,

FRANK HUNTER,

Attorneys for Plaintiff in Error.

FILE

SEP 24 1911

U. S. DISTRICT COURT



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

JOHN SAMLIN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE DIS-
TRICT OF MONTANA.

STATEMENT OF THE CASE.

John Samlin, the plaintiff in error herein, hereafter referred to as the defendant, was informed against in the District Court of the United States for the District of Montana, by an information filed therein May 7th, 1921. The information in substance charges: "That on or about the 19th day of March, 1921, John Samlin * * * at 211 N. 6th Street in the City of Miles City, * * * District of Montana * * * did then and there maintain a common nuisance, that is to say a building where intoxicating liquor, to-wit, whiskey, was kept and sold in violation of Title II of the National Prohibition Act, the maintaining of said common nuisance being then and there prohibited and unlawful; contrary etc." (Trans. page 2).

To this information a plea of not guilty was entered by the defendant (Trans. page 4). Thereafter the cause came on for trial on the charge contained in said information before the court and a jury (Trans. pages 5 and 6), and on July 13th, 1921, the jury returned a verdict in said case as follows:

"We, the jury in the above entitled cause, find the defendant guilty of the unlawful sale of intoxicating liquor, to-wit, whiskey, on the 11th and 19th of March, 1921." (Trans. page 7).

Upon said verdict the court entered judgment, which, omitting formal parts is as follows:

"The defendant was thereupon duly informed

by the Court of the nature of the charge against him *as appears in the information herein*, and of his arraignment, and plea of not guilty, and of his trial and the verdict of the jury of guilty of the unlawful sale of intoxicating liquor, to-wit, whiskey. * * * That whereas the said defendant having been duly convicted in this court of the offense of unlawfully selling intoxicating liquor, to-wit, whiskey, in violation of the National Prohibition Act, committed on the 11th and 19th days of March, 1921, at Miles City, in the State and District of Montana," etc.

and the defendant thereupon was sentenced to five months in the County jail and to pay the costs (Trans. pages 7 and 8).

Thereafter a petition for writ of error was filed (Trans. pages 9-10), together with assignments of error (Trans. pages 10-12), and a writ of error duly allowed (Trans. page 13); a bond was duly filed (Trans. pages 14-16); a writ of error duly issued (Trans. pages 17-18); citation of writ of error (Trans. pages 19-20); and the answer in the District Court to writ of error (Trans. pages 18-19).

Upon this record plaintiff in error seeks a reversal of said judgment.

SPECIFICATIONS OF ERROR.

No. 1.—That the verdict of the jury is contrary to law.

No. 2.—That the verdict of the jury herein finds defendant guilty of a crime not alleged in the information herein.

No. 3.—That the information herein charges the defendant with having on or about the 19th day of March, 1921, in the State and District of Montana, and within the jurisdiction of said court, at 211 North Sixth Street in the City of Miles City, county of Custer, in said State and District of Montana, maintained a common nuisance, that is to say, a building wherein intoxicating liquor, to-wit, whiskey, was kept and sold in violation of Title II of the National Prohibition Act, and the jury by its verdict in the above entitled court and cause found defendant guilty of selling whiskey in violation of the National Prohibition Act, and the judgment rendered and entered herein on said verdict convicts defendant of the crime of selling whiskey in violation of the National Prohibition Act, of which crime he was so found guilty by said verdict and the judgment of the court said defendant was not on trial nor charged therewith.

No. 4.—That the Court erred in entering judgment herein in favor of the United States and against the defendant.

No. 5.—That the Court erred in pronouncing sen-

tence upon said defendant and rendering and entering judgment against him herein.

No. 6.—That the Court erred in not discharging defendant after it received the verdict of the jury herein.

ARGUMENT.

The specifications of error may very properly be considered together, as the questions involved can be said to be the same.

This case is one charged under Section 21 of the National Prohibition Act, which provides:

“Any room, house, building, boat, vehicle, structure or place wherein intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or be imprisoned for not more than one year, or both.” * * * *

and the information only charges defendant with a violation of said section by the use of the words

“did then and there maintain a common nuisance, that is to say, a building where intoxi-

cating liquor, to-wit, whiskey, was kept and sold” * * * *

The verdict finds defendant guilty of the crime of selling whiskey on two specific dates, but does not fix the place of such sales anywhere within the jurisdiction of the trial court, or elsewhere.

The selling of intoxicating liquor is forbidden by sections 3, 6 and 10 of the National Prohibition Act and the penalty for a violation of any of said sections and the nature of the offense thereunder are vastly different from any penalty, under section 21, or the nature of the crime committed by violating said section 21. Under section 21 a defendant who is convicted thereunder is only guilty of a misdemeanor for each violation thereof, even though the violations should run into the hundreds in number. Whereas on the other hand for the first violation of sections 3, 6 or 10, the punishment of the crime under § 29 makes it a misdemeanor, with a different punishment therefor than that prescribed by section 21, and for a second or subsequent offense of sections 3, 6 or 10 by the same party the crime is a felony under its terms, for it may be punished by imprisonment of not less than one month nor more than five years, thus coming within the definition of a felony under

§ 335 U. S. Crim. Code; §10509 U. S. Compl. St. 1916.

It may be contended that the verdict convicts the

defendant of a lesser crime which is necessarily included in the greater, and that the crime of selling is such a lesser offense which is included in a greater crime, to-wit, the maintaining of a nuisance. But the question as to whether such is the case has been very ably passed upon in the case of *Poole vs. U. S.* 273 Fed. 623, 624, by the U. S. District Court for Montana. In the *Poole* case defendant was charged with three violations of the National Prohibition Act, to-wit, (1) under § 6 for manufacturing liquor without a permit, (2) under § 10 for failing to make a permanent record of such liquor, and (3) under § 18 for possession of property designed to manufacture liquor intended for use in violation of said Act. Defendant *Poole* in said case contended that the separate offenses were but one because the three things were in reality one continuous transaction. As to such contention of *Poole*, Judge Bourquin said:

“That the separate offenses are but one, and subject to but one penalty, is an unwarranted assumption. Congress having power to define offenses, to determine what acts shall constitute offenses, has declared clearly enough that these are separate offenses. See *Morgon vs. Devine*, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153; *Ebeling vs. Morgan*, 237 U. S. 625, 35 Sup. Ct. 710, 59 L. Ed. 1151. Neither is necessarily or at all included in any of the others.”

Again, in the case of *Dusold vs. U. S.*, 270 Fed. 574, the Circuit Court of Appeals for the Seventh Circuit recognizes that the various acts prohibited by the different sections of the National Prohibition Act are separate and distinct offenses, and that the various sections are in no manner dependent upon one another, saying:

“Certainly, one section cannot be limited in its application to instances referred to in another section where the former is more comprehensive than the instances enumerated in the latter.”

In the information in the case at bar Samlin was only accused of maintaining a nuisance and in no manner is it said he was the person who sold any liquor. The verdict finding Samlin guilty of selling liquor in no manner responds to the charge contained in the information and the trial court should not have received it or pronounced sentence upon it.

The anomalous condition is therefore presented that defendant is charged with one offense, found guilty of and punished for another offense entirely different.

Such a judgment cannot be sustained in the light of Article VI, amendments to the Constitution of the United States, which provides:

“In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation.”

The Supreme Court of the United States in passing upon this constitutional provision has said:

“In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right ‘to be informed of the nature and cause of the accusation.’ Amend. VI. In *United States vs. Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offence ‘with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;’ and in *United States vs. Cook*, 17 Wall. 174, that ‘every ingredient of which the offence is composed must be accurately and clearly alleged.’ It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, ‘includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient

in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.”

U. S. vs. Cruikshank, 92 U. S. 542, 558.

Again, the same court has expressed the rule as to criminal pleadings, viz:

“Where the offense is purely statutory, having no relation to the common law, it is, ‘as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.’ 1 Bishop, *Crim. Proc.* sect. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence. An indictment not so framed is defective, although it may follow the language of the statute.”

U. S. vs. Simmons, 96 U. S. 360, 362.

The rule laid down by the Supreme Court in construing the 6th Amendment to the Constitution is so well known that it requires no further citation of authority or comment. We submit there is nothing in the record before us which shows that Samlin was ever charged in any manner whatsoever with the sale of liquor and if he is hereafter prosecuted he has not a record wherein he can plead a prior judgment of conviction for the sale of intoxicating liquor, for the information is silent as to who sold the liquor in the place it is alleged that Samlin maintained as a nuisance and the verdict makes no mention of the place where the sales he was found guilty of were made. This condition of the judgment in this case would render ineffectual any attempt on his part to plead a former jeopardy.

Under this provision of the Constitution Samlin was entitled to know what he was charged with so as to prepare a defense. He was charged with maintaining the premises in question in such a manner that the same was a nuisance within the purview of Section 21 of the Volstead Act, but nothing was alleged in the information that he, himself, either sold or caused to be sold, any intoxicating liquor therein. Such a charge as he was confronted with only required him to defend himself by showing that the premises was not a place maintained by him where liquor was kept and sold. Without a single allegation that he sold, or caused to be sold, some kind of

intoxicating liquor, there was no reason for him to even suspect that the government would produce witnesses that he, himself, had made illegal sales. In a case such as this the distinction between the crime of maintaining a nuisance and selling intoxicating liquor should be borne in mind. It is perhaps best expressed in the case of *U. S. vs. Cohen*, 268 Fed. 420-424, where the court said:

“It is not the crime of selling the liquor, or selling of a single drink of liquor, by a given person, at a given place, which constitutes the nuisance, but it is the maintenance and use of the room, house, or place as a situs for the doing thereat of unlawful or criminal acts, which constitutes the nuisance.”

With this distinction in mind as so well stated in the words of the court last cited it cannot be seriously contended that the maintaining of a nuisance is a crime of such a higher degree as to include the lesser one of selling liquor.

One who is charged with the offense of selling liquor in violation of the National Prohibition Act is entitled to know by the allegations of the information as to the kind of a sale it is claimed he made in violation of law. Section 3 of the Act forbids the sale of liquor except as authorized by the Act itself. Having before us for consideration only that liquor which is called whiskey, Section 4 of the Act does not

apply, hence we are confined to Sections 6 and 10 of the Act and must suppose that it was a violation of one or the other of said last named sections for which Samlin has been found guilty by the verdict of the jury. Sales of liquor under permits for certain purposes permitted by the Act are entirely legal and it was the express intention of Congress to permit certain kinds of sales. The Eighteenth Amendment to the Constitution merely forbids the manufacture, sale and transportation of intoxicating liquor in the United States for beverage purposes. Can it be said from a reading of the verdict that Samlin sold whiskey "without first obtaining a permit from the Commissioner so to do" as forbidden by Section 6, or did he sell whiskey "without making at the time a permanent record thereof showing in detail the amount and kind of liquor sold" as forbidden by section 10. If Samlin had been charged with selling without a permit it may be that he could have shown a permit upon the trial or if charged with selling and failing to keep a record thereof he may have been able to produce such a record. Neither the permit nor the record would have been competent upon the charge of maintaining a nuisance, that is conducting a place for the doing of unlawful and criminal acts therein. Further Samlin could well have been guilty of selling whiskey on the 11th and 19th days of March, 1921, upon the streets of Miles City, Montana, San Francisco, California, or any other place he happened to be at and such sales would not make him guilty of maintaining

a nuisance under Section 21 for he would not at the time of such sales upon the streets be maintaining a place where liquor was kept and sold.

In 22 Cyc. at page 468, the rule is laid down that a conviction cannot be had of a crime attempted to be included in the offense specifically charged unless the indictment in describing the major offense contains all the essential averments of the lesser crime, or the greater offense necessarily includes all the essential ingredients of the lesser and that upon an indictment charging burglary and larceny the larceny must be well laid in order to support the offense for larceny.

Again in 22 Cyc., page 467, the rule is laid down that it is necessary in the statement of the graver offense in the indictment or information to allege all the essentials of the lesser charge.

A defendant cannot be charged with one crime and convicted of another merely because the other crime is brought out and developed by the proof on the trial of the crime charged, which proof though failing to establish the crime charged does show the commission of another offense by the defendant.

Hendrey vs. U. S., 233 Fed. 5; 16 Corpus Juris, page 1103, Sec. 2587.

Considering this case at every possible point of view one is impelled to arrive at the unavoidable conclusion that the verdict is a nullity and is in no manner responsive to the offense charged in the information

herein. A verdict which finds the defendant guilty in manner and form as charged in the indictment or information is sufficient provided the offense is alleged properly in the indictment or information but where the verdict is a special verdict and is in no manner responsive to the charge contained in the information it must state all of the facts and circumstances which constitute the offense that the defendant is found guilty of. If the verdict in this case can be said to be a verdict at all it is nothing more than a special verdict arrived at by the jury and the same must contain either in itself or by reference to the information every element of the offense which the verdict says the defendant is guilty of.

State vs. Hanner, 143 N. C. 632; 24 L. R. A.
(N. S.) 1-78

Patterson vs. U. S. 2 Wheaton 221; 4 U. S.
(L. Ed.) 224

Holmes vs. State, 78 N. W. 641
16 C. J. page 1102

People vs. Cummings, 49 Pac. 576, 117 Cal.
497

State vs. Pollack, 79 S. W. 980

State vs. Modlin, 95 S. W. 345

Peters vs. U. S., 94 Fed. 127.

The subject of special verdicts is very fully discussed in the case of State vs. Hanner, 143 N. C. 632;

57 S. E. 154; and in a most elaborate footnote to said case, which is also reported in Volume 24 L. R. A. (N. S.) pages 1 to 78, the rule is laid down and supported by the weight of authority as follows:

“A special verdict in a criminal case must include all the essential elements of the offense charged, or there can be no conviction.”

24 L. R. A. (N. S.) Notes on pages 12-15

Again the footnote, in the Hanner case, on pages 43-44 of 24 L. R. A. (N. S.) states the rule of special verdicts to be:

“If the findings of a special verdict in a criminal case are not responsive to the allegations of the indictment, they will not sustain a judgment.”

The rules we have just quoted from the footnotes to the Hanner case in 24 L. R. A. (N. S.) are supported by a long line of the authorities and a reading of that footnote without even referring to the specific cases cited therein will convince anyone of the correctness of our contentions. We expressly refrain from making this brief longer by repeating herein the cases cited in the footnote as this court will naturally prefer its own reading of the Hanner case and said footnote in the original.

It is of course most elementary that the venue of every crime must be alleged and proven in a criminal case. In the present case there is not a single ref-

erence in the verdict to the information on file herein, hence it cannot be said that the sales mentioned in the verdict took place at Miles City, Montana, where the nuisance is alleged to have been maintained, nor does the verdict itself state where said sales occurred and the venue of the sales not having been alleged in the information itself it should have been found by the jury in its verdict.

Commonwealth vs. Call, 21 Pick. (Mass.)
509.

The most casual examination of the record shows that the judgment itself which was entered upon the verdict not only pronounces sentence upon the defendant for a conviction of a crime that he has not been found guilty of, but indeed goes so far as to say that he is sentenced upon a verdict which found him guilty of an offense that he was not charged with. On page 7 of the Transcript the judgment recites:

“The defendant was thereupon duly informed by the court of the nature of the charge against him as appears in the information herein.”

A reference to the information herein on page 2 of the Transcript shows that the nature of the charge against him was the maintenance of a nuisance. The judgment then proceeds to recite:

“and of his arraignment, and plea of not guilty, and of his trial and the verdict of the

jury of guilty of the unlawful sale of intoxicating liquor, to-wit, whiskey.”

The judgment further recites as appears on page 8 of the Transcript:

“That whereas said defendant having been duly convicted in this court of the offense of unlawfully selling intoxicating liquor, to-wit, whiskey, in violation of the National Prohibition Act, committed on the 11th and 19th days of March, 1921, at Miles City, in the State and District of Montana.”

“It is therefore considered, ordered and adjudged that for said offense you, the said John Samlin, be confined and imprisoned in the County jail at Helena, Montana, for a period of five months,” etc.

Such a judgment, completely filled as it is with contradictory and inconsistent statements based upon a verdict which is not general in its finding of guilty of the offense alleged in the information and by reason of failing to recite the place of sales does not show the venue, is a void judgment and of no force and effect. How can it be said in reading that part of the judgment where it recites:

“That for such offense you, the said John Samlin, be confined and imprisoned,” etc., whether it refers to a violation of section 21 as al-

leged in the information, or Sections 3, 6 and 10, which would be the only basis for a judgment upon the verdict herein.

It is most respectfully submitted that the judgment herein should be reversed for the errors complained of.

McINTIRE & MURPHY,
FRANK HUNTER,
Attorneys for Plaintiff in Error.

**In the
United States
Circuit Court of Appeals
For the Ninth Circuit**

JOHN SAMLIN,

Plaintiff In Error,

vs.

UNITED STATES OF AMERICA,

Defendant In Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District
Court for the District of Montana.

Appearances:

JOHN L. SLATTERY,

United States Attorney.

RONALD HIGGINS,

Asst. United States Attorney.

WELLINGTON H. MEIGS,

Asst. United States Attorney.

Attorneys for Defendant in Error.

FILED
OCT 16 1914
U. S. DISTRICT COURT
D. D. MONTGOMERY



No. 3746

**In the
United States
Circuit Court of Appeals
For the Ninth Circuit**

JOHN SAMLIN,

Plaintiff In Error,

vs.

UNITED STATES OF AMERICA,

Defendant In Error.

Brief of Defendant in Error

I.

In seeking a reversal of the judgment herein, the plaintiff in error contends: (1) that the penalty for the unlawful sale of intoxicating liquor is "vastly different from the penalty imposed for maintaining a nuisance under Sec. 21 of the National Prohibition Act"; (2), that the unlawful sale of intoxicating liquor is not included in the charge of maintaining a common nuisance under said Sec. 21, but is a separate and distinct offense; (3), that the verdict does not respond to the

charge in the information herein; (4), that the constitutional right of the defendant to be informed of the nature and cause of the accusation has been violated by the entry of the judgment herein; and (5), that a defendant charged with the unlawful sale of intoxicating liquor under the National Prohibition Act is entitled to be informed as "to the kind of sale" he is charged with having made.

As to the first contention, namely, that the penalty for selling intoxicating liquor unlawfully is vastly different from the penalty for maintaining a nuisance, it would appear that no argument is required to show its inapplicability to the case at bar, for difference in punishment, whether vast or otherwise, does not preclude a verdict of guilty of a lesser charge which is necessarily included in that contained in the indictment or information. This is well illustrated by the cases cited below sustaining judgments of conviction of lesser crimes than those charged, as, for instance, conviction of manslaughter upon the charge of murder and conviction of attempts to commit the crime charged in the indictment or information.

While it is true that there is a difference between the penalties imposed for maintaining a nuisance and for the unlawful sale of intoxicating liquor (as for the first offense), it is that very difference, so far as the maximum penalties are concerned, that makes the unlawful sale of intoxicating liquor (as for a first offense) a lesser crime than that of maintaining a nuisance.

It is provided by Sec. 21 of said National Prohibition Act that a "person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than \$1000 or be imprisoned for not more than one year, *or both.*" The penalty for the unlawful sale of intoxicating liquor for a first offense is fixed by Sec. 29 of the Act as a fine of not more than One Thousand Dollars *or* imprisonment not exceeding six months. The penalty for a first offense under Sec. 29 is less than that prescribed for maintaining a nuisance.

The record in this case is silent as to whether plaintiff in error had been previously convicted of the offense of unlawfully selling intoxicating liquor, and since the punishment imposed, to-wit, imprisonment for five months, is within the limits prescribed for a first offense, it will be presumed that no evidence was offered of a prior conviction.

II.

As to the second contention of plaintiff in error, namely, that the unlawful selling of intoxicating liquor is not included in a charge of maintaining a nuisance under the National Prohibition Act, but is a separate and distinct offense, it is sufficient to say, conceding that they are separate and distinct offenses, yet it does not follow that the unlawful selling is not included in the charge of maintaining a nuisance. Burglary and larceny, for instance, are separate and distinct offenses, and so, also are murder and man-

slaughter, and the same might be said of any lesser offense that is included in a greater offense. It is no argument to say that a greater offense does not include a lesser offense because they are separate and distinct offenses. The case of *Poole v. United States*, 273 Fed. 623 has no possible application to the case at bar, because the question of inclusion of offenses was not involved as that question is raised here. In the *Poole* case, the defendant was charged with three separate violations of the Volstead Act, each one in itself a distinct offense. In the case at bar, there is only one count. In effect, the contention of the defendant in the *Poole* case was that his actions or omissions constituted but one crime, or one violation of the Prohibition Law. The offenses were not necessarily inter-related, the defendant having violated three different sections of the Volstead Act, namely (1) manufacturing liquor without a permit under Sec. 6; (2) manufacturing liquor without making the permanent record required under Sec. 10; and (3) possessing property designed for the manufacture of liquor for use in violation of the Act, under Sec. 25.

The case of *Dusold v. United States*, 270 Fed. 574, (C. C. A. 7), cited by plaintiff in error, does not even discuss the question of the inclusion of offenses.

III.

The next contention of plaintiff in error, namely, that the verdict does not respond to the charge contained in the information is disposed of by what is

said above. It might as well be argued that a verdict of guilty of manslaughter is not responsive to a charge of murder or that, in fact, a verdict of guilty of any offense included within a greater offense charged in the indictment or information does not respond to the charge of the greater offense. Such an argument merely begs the question, and the same might be said of the fourth contention of plaintiff in error, namely, that the constitutional right of the defendant to be informed of the nature and cause of the accusation has been violated by the entry of the judgment herein.

It is true that Samlin was not charged directly with the unlawful selling of intoxicating liquor, but, it is submitted, that the language of the charge in the information clearly indicated to him all of the allegations which the defendant was bound to prove, thereby enabling him to prepare a defense. He knew that evidence in support of the information was bound to be introduced to show, first, that Samlin maintained the specified building; second, that intoxicating liquor was sold therein in violation of law, or, third, that intoxicating liquor was kept therein in violation of law. Being presumed to be a person of ordinary understanding, he knew that the selling of liquor in the building involved the keeping (meaning possession) of liquor therein, for, sale under the Volstead Act implies delivery, and there could not be a sale of liquor in the building unless the liquor was actually present therein. He knew that such sales could be proved to have occurred during the period within the

statute of limitations, and that such proof would necessarily show the time, place, persons present, the seller, the purchaser, the kind of liquor sold, and the price. He knew from the language of the information, that the unlawful traffic in liquor in the specified building is the gist of the offense. Proof of maintenance of the nuisance by the defendant is generally a mere incident in cases of this character. By this we do not mean the maintenance on the part of the defendant is not a material ingredient of the offense charged in the information, but that the unlawful selling of intoxicating liquors in the specified building is really the *corpus delicti*, after all.

IV.

As to the contention of plaintiff in error that a defendant charged with the unlawful sale of intoxicating liquor is entitled to be informed "as to the kind of sale" he is charged with having made, it is sufficient to say that if the proof disclosed that the sales were made under a permit and a record of the sales was kept, there would have been no unlawful sales, and the language of the information is sufficiently explicit to charge the defendant with knowledge that evidence of "any kind of a sale" in violation of Title II of the National Prohibition Act was admissible, and he could expect it would be introduced; and hence, the permit, if there was one, and the record, if there was one, could be introduced to show that the sales were not unlawful.

V.

The law and the decisions support the judgment in this case.

“The general rule at common law was that when an indictment charged an offense which included another less offense or one of a lower degree, defendant, although acquitted of the higher offense, might be convicted of the less.”

22 Cyc. 466.

“Where the charge of the greater offense contains the essential elements of a lesser offense, the jury may acquit the defendant of the graver charge and find him guilty of the less offense included therein; and such provision is usually made by statute.”

22 Cyc. 472.

“On a special verdict sustained by the evidence, it is the duty of the court to enter judgment thereon for or against the accused.”

State v. Moore, 29 N. C. (7 Ired. L.) 228.

It will be observed in this case that the plaintiff in error does not question the sufficiency of the evidence to sustain the verdict, so it will be presumed that so far as the evidence is concerned, the jury was warranted in returning the verdict which it did.

In the case of United States v. Carr, Federal Case No. 14732, Carr was charged with murder, and the court in its charge to the jury instructed them that a recent Act of Congress declared that in all criminal causes the defendant might be found guilty of any offense, the commission of which was necessarily in-

cluded in that with which he was charged in the indictment. (Sec. 9, Act June 1, 1871, 17 Stat. 198). The court instructed the jury that the crime of manslaughter was included in the crime of willful murder. This case is cited in *United States v. Meagher*, 37 Fed. 878, to the same point.

And, in *United States v. Dixon*, Federal Case No. 14968, the defendant was tried upon an indictment for burglary. The jury having retired, sent to the court to know whether they could, upon that indictment, find the prisoner guilty of stealing only, and acquit him of the burglary. The court instructed the jury that it was in their power to find a general verdict of guilty, or not guilty, or to find specially that the prisoner was guilty of a part only of the facts which go to constitute the crime of burglary; and that if they were not satisfied as to the breaking and entering the house in the night time, they might find the defendant guilty of larceny only. Whereupon, the jury retired and in a short time returned a verdict of not guilty as to the breaking and entering the house in the night, but guilty of feloniously stealing the goods.

Another case in point is *United States v. Cropley*, Federal Case No. 14892. In that case defendant's counsel moved the court to instruct the jury that if they should not find the assault to be with intent to murder, they must find the defendant not guilty. The court refused to give the instruction and directed the jury that they might, if justified by the evidence, find

the defendant guilty of the assault only, without the intent charged.

In *United States v. Read*, Federal Case No. 16126, an indictment was filed against William Read for breaking the storehouse of Cook & Clare, and taking therefrom goods of the value of more than \$4000.00. The jury having inquired whether they might find the prisoner guilty of simple larceny upon this indictment, the Court informed them that they might. The jury accordingly found the defendant guilty of stealing the goods, but not of breaking the storehouse.

In *State v. May*, (Kans.) 93 Pac. 159, 14 L. N. S. 603, the defendant was prosecuted upon the charge of setting up and keeping a gambling device, and was convicted of the inferior offense of betting upon a game of chance at a gambling resort. He appealed, and one of his grounds of error was that the court erred in instructing the jury that the information charged a violation of the statute upon which the verdict was based. In the course of the opinion, after setting out the statute upon which the information was obviously drawn, and the one to which the verdict obviously referred, said:

“From this statement of the statutes, the information, and the verdict, it appears that the section upon which the conviction was had is directed against betting under certain circumstances, and that the defendant was not in direct and express terms charged with having bet upon anything. A conviction may always be had upon any less offense which is included within that charged (Gen. Stat. 1901, Sec. 5564), or, as said in

State v. Burwell, 34 Kan. 312, 8 Pac. 470: 'Wherever a person is charged upon information with the commission of an offense under one section of the statutes, and the offense charged includes another offense under another section of the statutes, the defendant may be found guilty of either offense.' Some liberality of interpretation is permitted in such cases. The rule is thus stated in 22 Cyc. Law. & Proc. p. 476: 'While it is not necessary to make a specific charge of all the offenses included in the charge for which the indictment is drawn, a conviction cannot be had of a crime as included in the offense specifically charged, unless the indictment, in describing the major offense, contains all the essential elements of the less, or the greater offense necessarily includes all the essential ingredients of the less.' In several instances it has been held that words used in the statute defining the inferior offense need not be used in the information, where the statements there made in charging the greater offense, necessarily show the existence of all the facts essential to constitute the less. For example, a conviction under a statute Sec. 2029, Gen. Stat. 1901) against administering medicine with the intent to procure an abortion has been sustained under an information which did not use the word 'abortion,' being drawn under statute forbidding the giving of medicine to a woman pregnant with a quick child with the intent to destroy such child; the reasoning being that the destruction of a quick child necessarily involved the procuring of an abortion.. State v. Watson, 30 Kan. 281, 1 Pac. 770. The exact question to be here determined, is, therefore, whether the acts charged in the information necessarily involved those found in the verdict. The allegations that the defendant set up a gambling device, and induced persons to play for money by means thereof, sufficiently

imply that the place where it was maintained was one to which persons were accustomed to resort for the purpose of gambling, and which was kept for that purpose.”

Section 1035 of the Revised Statutes of the United States (1701 Comp. Stat.) controls this case, and is as follows:

“In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; *provided*, that such attempt be itself a separate offense.”

In *Stevenson v. United States*, 162 U. S. 466, 40 L. ed. 980, Mr. Justice Peckham, who delivered the opinion of the court, after quoting Sec. 1035, R. S., said:

“Under this statute the defendant charged in the indictment with the crime of murder may be found guilty of the lower grade of crime, viz., manslaughter. There must, of course, be some evidence which tends to bear upon that issue. The jury would not be justified in finding a verdict of manslaughter if there were no evidence upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect. *Sparf v. United States*, 156 U. S. 51.”

In the case of *Sparf v. United States*, cited above, the defendant was charged with murder, and in the course of the opinion delivered by Mr. Justice Harlan, the court said:

“The court below assumed, and correctly, that Sec. 1035 of the Revised Statutes did not authorize the jury in a criminal case to find the defen-

dant guilty of a less offense than the one charged, unless the evidence justified them in so doing. Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial. The only object of that section was to enable the jury, in case the defendant was not shown to be guilty of the particular crime charged, *and if the evidence permitted them to do so*, to find him guilty of a lesser offense necessarily included in the one charged, or of the offense of attempting to commit the one charged."

See also, *United States v. Lewis*, 111 Fed. 630.

United States v. Linnier, 125, Fed. 83.

United States v. Hanslee, 79 Fed. 303.

In conclusion, it is respectfully submitted, first, that the verdict is responsive to the charge contained in the information, and, second that no constitutional rights of the plaintiff in error have been violated by the entry of judgment herein, and, third, that the action of the jury is within the scope of Sec. 1035 of the Revised Statutes, and, fourth, that the judgment should be affirmed.

JOHN L. SLATTERY
RONALD HIGGINS
WELLINGTON H. MEIGS
Attorneys for Defendant in Error.

9

United States
Circuit Court of Appeals
For the Ninth Circuit.

RAY McCURRY and JOHN WALL,
Plaintffs in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

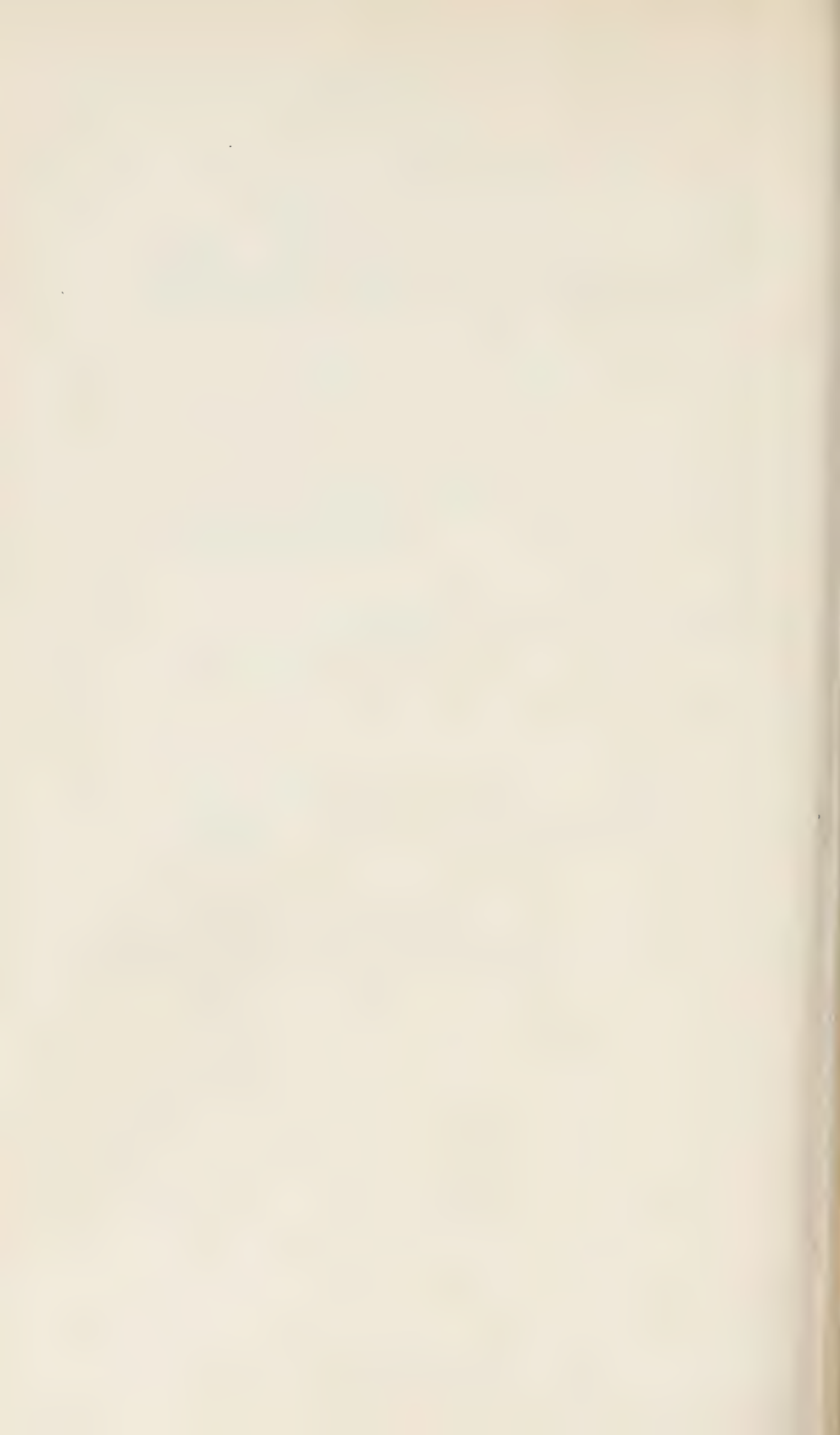
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P. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

RAY McCURRY and JOHN WALL,
Plaintffs in Error,
vs.
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Transcript of Record.

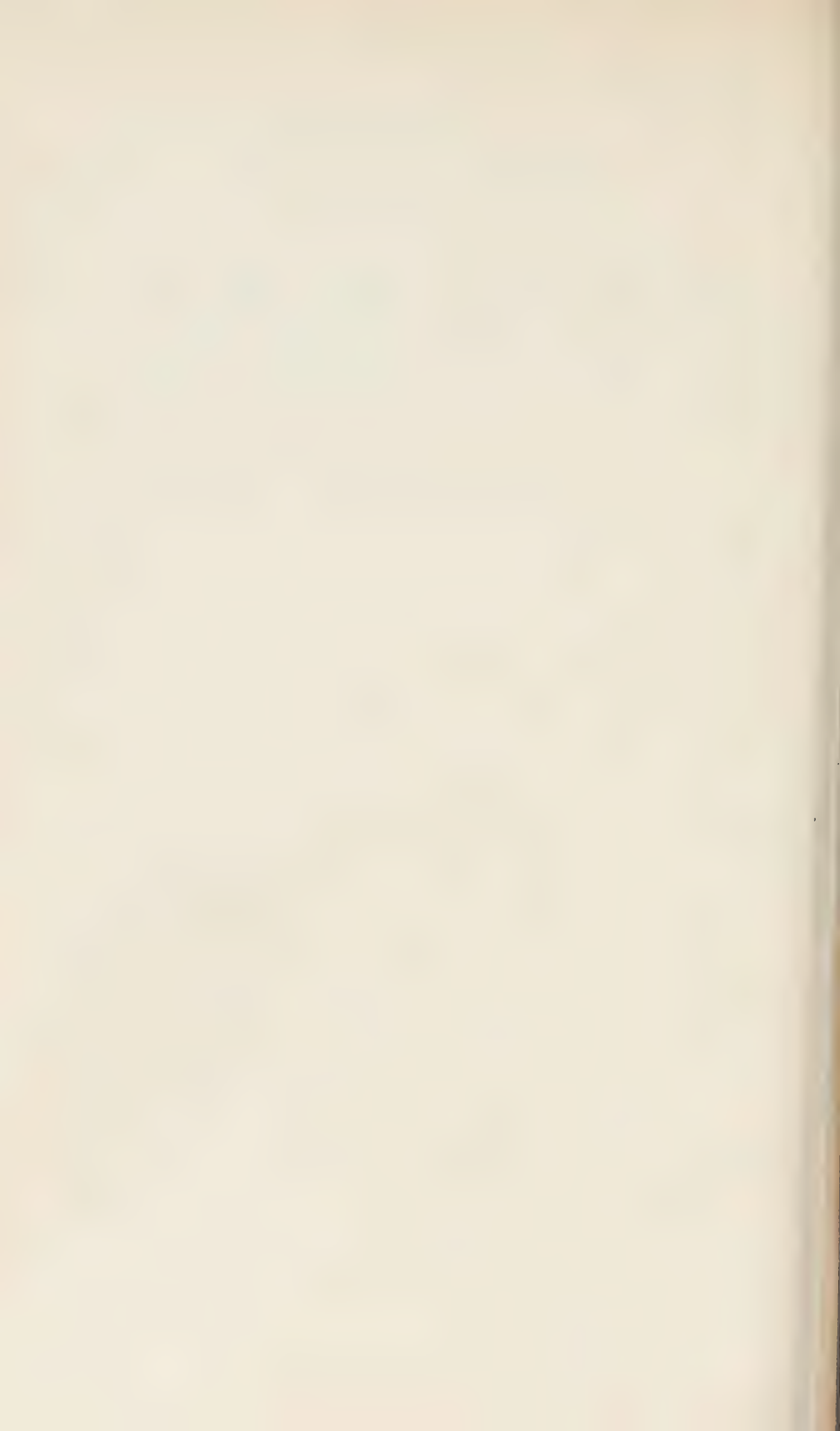
Upon Writ of Error to the United States District Court of the
District of Montana.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. MILLER, O'CONNOR & MILLER, Livingston, Montana,
Attorneys for Defendants and Plaintiffs in Error.

JOHN L. SLATTERY, Esq., United States Attorney, RONALD HIGGINS, Esq., Assistant U. S. Attorney, W. H. MEIGS, Esq., Assistant U. S. Attorney, all of Helena, Montana,
Attorneys for Plaintiff and Defendant in Error. [1*]

In the District Court of the United States, District of Montana.

No. 3674.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

RAY McCURRY and JOHN WALL,
Defendants.

BE IT REMEMBERED, That on October 28th, 1920, an indictment was presented and filed herein, being in words and figures as follows, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

Indictment.

United States of America,
District of Montana,—ss.

In the District Court of the United States of America, within and for the District of Montana, of the September term of the said District Court held at Butte, Silver Bow County, in the said State and District of Montana, in the year of our Lord one thousand nine hundred and twenty.

The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the State and District of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United States, within the said State and District of Montana, upon their oaths and affirmations do find, charge and present:

That one Ray McCurry and one John Wall, whose true names are to the grand jurors aforesaid unknown, late of the State and District of Montana, heretofore, to wit, on the first day of August, 1920, in the State and District of Montana, unlawfully and feloniously did make and ferment a certain mash fit for the production of spirits, in quantity about one hundred gallons, a more particular description of which is to the grand jurors aforesaid unknown, on premises other than a distillery duly authorized according to law, which premises were then and there known and described as the Ray McCurry ranch, situated on Section Thirty (30), in

Township Four (4), North of Range Eight (8), East of the Montana principal meridian; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths and [3] affirmations aforesaid, do further find, charge and present:

That on the first day of August, 1920, in the State and District of Montana, said Ray McCurry and said John Wall, whose true names are to the grand jurors aforesaid unknown, late of the State and District of Montana, on premises known and described as the Ray McCurry Ranch, situated on Section Thirty (30), in Township Four (4), North of Range Eight (8), East of the Montana principal meridian, in the State and District of Montana, and in the Internal Revenue Collection District of Montana, having then and there in their possession and custody and under their control a certain still set up, did fail and neglect to register the same with the Collector of Internal Revenue of the said United States for the said Collection District, by subscribing and filing with him duplicate statements in writing, setting forth the particular place where the said still was so set up, the kind and cubic contents of said still, the owner or owners thereof, his place of residence, or their places of residence, and the purpose for which the said still had been or was intended to be used. And so the grand jurors aforesaid, upon their oaths and affirmations aforesaid,

do say that the said Ray McCurry and said John Wall, whose true names are to the grand jurors aforesaid unknown, on the day and year aforesaid, on the premises aforesaid, in the State and District aforesaid, unlawfully did have in their possession and custody, and under their control, a still set up, which was not then and there registered as required by law; [4] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That said Ray McCurry and said John Wall, whose true names are to the grand jurors aforesaid unknown, late of the State and District of Montana, on the first day of August, 1920, in the said State and District of Montana, on premises then and there known and described as the Ray McCurry ranch, situated on Section Thirty (30) in Township Four (4) North of Range eight (8) East of the Montana principal meridian, in the State and District of Montana, unlawfully and feloniously did carry on the business of distillers by producing distilled spirits and making a mash fit for distillation and for the production of spirits, without having given bond as required by law; contrary to the form of the statute in such case made and provided and

against the peace and dignity of the United States of America.

W. W. PATTERSON,

United States Attorney for the District of Montana.

Filed October 28, 1920. C. R. Garlow, Clerk. [5]

[Indorsed on the back:] No. 3674. United States District Court, District of Montana. United States of America vs. Ray McCurry and John Wall. Indictment. A True Bill. W. D. Fenner, Foreman of Grand Jury. W. W. Patterson, United States Attorney, District of Montana.

Witnesses:

JAMES McCLARTY.

C. C. ESGAR.

ZADE MORGAN.

C. E. GILBERT.

Bonds \$500.00 each.

Presented by the grand jury in open court by their foreman, in their presence, and filed this 28th day of October, A. D. 1920.

C. R. GARLOW,

Clerk. [6]

Thereafter, on January 3d, 1921, defendants were arraigned and entered their pleas of not guilty, the record thereof being as follows, to wit:

No. 3674.

UNITED STATES

vs.

RAY McCURRY and JOHN WALL.

Arraignment and Pleas.

Defendants present in court and being arraigned, they answered that their true names are, respectfully, Ray McCurry and John Wall. Thereupon the indictment was read to defendants, whereupon each of said defendants entered a plea of not guilty and setting of the case for trial was ordered continued for the present. The defendants stated that their attorneys are Miller, O'Connor & Miller.

Entered in open court January 3d, 1921.

C. R. GARLOW,
Clerk. [7]

Thereafter, on January 17th, 1921, the cause came on regularly for trial, the record of the trial, the verdict, and the judgment being as follows, to wit:

No. 3674.

UNITED STATES

vs.

RAY McCURRY and JOHN WALL.

Trial.

This cause came on regularly this day for trial, defendants present with their attorney, James F. O'Connor, Esq., and J. H. Toole, Assistant U. S. Attorney, appearing for the United States. Thereupon the following were duly impaneled, accepted and sworn as a jury to try said cause, viz: Jas. J. Shepherd, Otto Mattson, H. H. Pigott, Chas. A. McFarland, Geo. Malben, Geo. T. Baxter, John

Commers, D. L. Nelson, W. F. Burke, Chas. A. Benson, B. J. Barnekoff, and Harry T. Blaine. Thereupon, C. E. Gilbert, Jas. McClarty, Mrs. Meeker, A. Johnson, H. J. Reese, C. C. Esgar, and J. L. Eason were sworn and examined as witnesses for plaintiff, and Plaintiff's Exhibit One, being a still, and Plaintiff's Exhibit two, being a bottle, containing moonshine, introduced in evidence, whereupon plaintiff rested.

Thereupon defendants moved the Court to direct the jury to return a verdict of not guilty herein, for lack of proof, which motion was by the Court denied. Thereupon John Wall and Ray McCurry were sworn and examined as witnesses for defendants, whereupon the evidence being closed, after the arguments of counsel and instructions of the Court to certain of which instructions the defendants then and there excepted and exception noted, and also the exception of defendants being noted because the Court failed to give a requested instruction of said defendants, the jury retired to consider of their verdict. Thereafter at 4 P. M. the jury returned into court and requested further instructions, whereupon the Court, after further instructing the jury, the defendants excepting to said instructions [8] as so given, and exception noted, the jury again retired for further deliberation. Thereafter the jury returned into court with their verdict, which was received by the Court and ordered filed and read, and being as follows, to wit:

Verdict.

“We the jury in the above-entitled cause, find the defendants guilty in manner and form as charged in the indictment on file herein as to Counts Two and Three, and not guilty as to Count One.

GEORGE MALBEN,
Foreman.”

Thereupon the defendants being present in court, judgment was ordered entered as follows, to wit:
[9]

In the District Court of the United States, District
of Montana.

No. 3674.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

RAY McCURRY and JOHN WALL,
Defendants.

Judgment.

The United States Attorney with the defendants and their counsel present in court.

The defendants were thereupon duly informed by the Court of the nature of the charge against them as appears in the indictment herein, and of their indictment, arraignment, and pleas of not guilty and of their trial and the verdict of guilty as to counts two and three of the indictment.

And the defendants were then asked if they had any legal cause to show why judgment should not be pronounced against them, to which they replied that they had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendants having been duly convicted in this court of the offense of unlawfully having in their possession and custody a certain still set up, without having registered the same as required by law, and unlawfully carrying on the business as distillers without having given a bond as required by law, committed on the 1st day of August, 1920, in the State and District of Montana, as charged in the indictment herein.

It is therefore CONSIDERED, ORDERED, AND ADJUDGED that for said offense you, the said Ray McCurry and John Wall, each be confined and imprisoned in the county jail at Helena, Montana, for the term of Nine Months, and you, the said Ray McCurry, pay [10] a fine of Five Hundred Dollars, and costs taxed at \$170.90, and you, the said John Wall, pay a fine of Two Hundred Dollars, and costs taxed at \$170.90, and that you be confined in said county jail until said fines are paid or you are otherwise discharged according to law. Thereupon, on motion of defendants, and for good cause, commitment ordered stayed for twenty days.

Judgment rendered and entered January 17th, 1921.

C. R. GARLOW,
Clerk.

Filed January 17th, 1921. C. R. Garlow, Clerk.
[11]

Thereafter, on February 17th, 1921, notice of motion and motion for new trial was duly filed herein, as follows, to wit: [12]

In the District Court of the United States, in and
for the United States of America.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

JOHN WALL and RAY McCURRY, or RAY
McCURRY and JOHN WALL,
Defendants.

Notice of Motion for New Trial.

To the Above-named Plaintiff and Its Attorney,
GEORGE F. SHELTON, United States Dis-
trict Attorney for Montana.

PLEASE TAKE NOTICE: That the above-named defendants intend to move the Court, and do hereby move the Court, to set aside and vacate the judgment made, entered and filed on the 17th day of January, A. D. 1921, and to grant a new trial of the said cause or case for the following causes which materially affected the substantial rights of the defendants, namely:

(1) Newly discovered evidence material to the defendants which they could not with reasonable diligence have discovered and produced at the trial.

(2) Error in law occurring at the trial and excepted to by the defendants.

Said notice will be made upon the bill of exceptions hereinafter to be prepared and served upon you and upon the minutes of the court record.

MILLER, O'CONNOR & MILLER,

By JAS. F. O'CONNOR,

Attorneys for Defendants. [13]

Due, timely and legal service of the foregoing notice of intention for a new trial and receipt of a true copy thereof is hereby acknowledged this 16th day of February, 1921.

GEORGE F. SHELTON,

United States Attorney,

For Plaintiff.

Filed February 17, 1921. C. R. Garlow, Clerk.
[14]

Thereafter, on July 2d, 1921, the decision and order of the Court denying new trial was filed herein, as follows, to wit: [15]

In the District Court of the United States in and
for the District of Montana.

UNITED STATES

vs.

McCURRY & WALL.

Decision and Order Denying New Trial.

Defendant's motion for a new trial upon accusation of illicit liquor manufacture is saved from

plaintiff's objection that the Court is without jurisdiction to hear the motion at the term succeeding that at which it was filed, the rule of Klein's Case, 140 Fed. 213, by court rule 74, which provides that the motion filed "shall be deemed to be entertained." The motion fails to specify the particular error of law relied upon as required by said rule, but the bill of exceptions filed with it and which the rule does not contemplate for use upon the motion, though commonly so used, containing only the Court's charge and two exceptions to parts of it, will be taken to supply the omission. One exception is to the definition of reasonable doubt.

The Court gave the classical definition of Webster's case, viz., that state of the evidence in view of which jurors "cannot say they feel an abiding conviction to a moral certainty of the truth of the charge," in both affirmative and negative forms. This seems so much a sing-song incantation which as Bishop says (1 Bish. Cr. Pro., sec. 1094) is calculated "to darken more minds of the classes from whom our jurors are mainly drawn than it will enlighten," even in Boston where it originated, that to render it more clear the Court also stated it in words of more common use, being synonyms and equivalents, viz., that "abiding conviction" is a "judgment that persists in staying with you," and "moral certainty" is a "high degree of probability." And the jury were told proof of guilt could not and so need not attain absolute certainty, that it could not rise above probability in some degree, and that when proven to that "high degree of probability

that creates in your minds an abiding conviction to a moral certainty that he is guilty," there was no reasonable doubt and was duty to convict. This, says the Supreme Court in *Dunbar's Case*, 156 U. S. 199, "is unquestionably the law." The jury was not led to believe the verdict was to be based on the doctrine of chances. The nature of evidence, proof, probability and certainty was thus explained to them to meet counsel's halted endeavor to argue to them that a verdict of guilty could not be found upon [16] probabilities, however strong or great, which is not law.

In no case does proof rise above a degree of probability. In no case is there absolute certainty, not even upon a plea of guilty, false pleas of guilty being experienced by most trial courts.

The other exception is to the instruction that from the circumstances, there being no direct evidence, could be inferred or presumed that defendants had not registered the still nor filed bond; that by their denials of ownership, interest in and knowledge of the still, they practically admitted both failure to register and failure to give bond; that if they had registered the still and filed bond, no one better knew it than defendants and they easily could have so testified; that plaintiff did not permit registry of stills of the character involved in remote timber groves nor accept bonds therefor; and that the inference or presumption so created, the burden shifted to defendants to rebut it. And this too is law.

See *Faraone vs. U. S.*, 259 Fed. 509. U. S. vs. *Turner*, 266 Fed. 251.

The motion is denied.

July 2d, 1921.

BOURQUIN,
J.

Filed July 2d, 1921. C. R. Garlow, Clerk. [17]

Thereafter, on July 2d, 1921, bill of exceptions was duly settled and allowed, and filed herein, being as follows, to wit: [18]

In the District Court of the United States in and
for the District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

McCURRY and WALL,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED that this cause came on regularly for hearing on Monday, January 17, 1921, at ten o'clock A. M., before the Honorable George M. Bourquin, Judge presiding, and a jury of twelve, which were regularly empanelled.

The Government being represented by George H. Shelton, Esquire, United States District Attorney, and J. F. O'Connor, Esquire, represented the defendants.

Whereupon the following proceedings were had and done:

(Introduction of Testimony.)

MONDAY AFTERNOON—January 17, 1921.

Instructions of the Hon. George M. Bourquin, Judge.

Gentlemen of the Jury:

You have heard the evidence and the argument of counsel, and it is now for the Court to deliver to you what is termed the charge, or instructions. That, as a rule, is to make you acquainted with the law that applies to the case, and which you apply in finally arriving at and rendering your verdict.

It is true the Court may also in its instructions or charge discuss the evidence, and might even express an opinion upon the facts in respect to what witnesses seem to the Court to be creditable, and whether or not the defendants are guilty or not guilty. Rarely, however, does a Court go as far as to express [19] its opinions, but even if it does, they are not binding upon the jury; and they are never expressed in an attempt or hope to bind you, because the Court has no such power, but only to endeavor to aid you to reason the case to a correct conclusion. You are the exclusive judges of the facts; what conclusions you arrive at from the evidence; what witnesses to believe. The Court is the exclusive judge of the law. You accept the law from the Court as the Court states it to you because that is the law, and we all accept the facts from you as you determine them by your verdict.

The indictment in this case, which is not evidence

but merely the written charge against the defendants, accuses them of having in last August fermented a certain mash fit for the production of spirits at a place other than a duly authorized distillery.

There is an act of Congress providing that whoever makes a mash fit for the production of spirits at a place other than an authorized distillery, if convicted by a jury shall be punished accordingly.

The second count charges the defendants with having in their control and in their custody a still for the production of spirits without having registered the same with the Commissioner of Internal Revenue for the district,—the Collector of Internal Revenue.

The law is that if anyone should set up a still he shall register it with the Collector of Internal Revenue for the district. If he does not do so he commits an offense and shall be punished as the law directs.

The third count is that these defendants engaged in the business of distilling intoxicating liquors without having given the bond as required by law. The law also requires that all [20] persons who engage in distilling shall give a bond to comply with the law, and the law is that they shall pay the taxes, and the object of that law, as I have stated to you, is so as to enable the Collector of Internal Revenue to collect the taxes that are due from those who distill intoxicating liquors. These laws are still in force even if we have prohibition against the manufacture and use of liquor as a beverage; because we will still

have distilleries, and operators must still register them and give bonds, and must still make their mashes at no other place. The law is so written and it is your duty and mine to follow the law without any question.

I think we can all agree also that the law in reference to distilleries and collection of taxes upon them is a good law.

The defendants have pleaded not guilty to these charges. You might find one of them guilty of all these charges, or any one of them, or both of them of any one of the charges, depending upon your opinion and judgment in view of the evidence; or you might find them not guilty of any or all of these charges, depending entirely on your view of the evidence. You might convict one or acquit the other, you might convict both or acquit both, depending upon your judgment from the evidence.

The defendants having plead not guilty, that imposes upon the Government the burden of proving to your satisfaction that they are guilty beyond a reasonable doubt before you can justly convict them. They are presumed to be innocent at the commencement of the trial. We do not know that they are innocent or guilty, knowing nothing of the case. So that the law creates a presumption of innocence in their favor. You will bear that in mind throughout the trial, and in the light of it, you weigh the evidence against them and for them to determine whether or not that [21] presumption of innocence is overcome, and to a degree that satisfies you that they are guilty beyond a reasonable doubt.

Whenever the presumption of innocence has been overcome by the evidence to that degree that you are satisfied that they are guilty beyond a reasonable doubt, the presumption of innocence disappears from the case and it will be your duty to find them guilty.

When I say the Government must prove them guilty beyond a reasonable doubt, you take into consideration also the evidence that the defendants have submitted in their own behalf, and weighing it all together, considering it altogether determine whether or not they are guilty beyond a reasonable doubt. Remember that the proof before they can be found guilty is only that they are guilty beyond a reasonable doubt. Not beyond all doubt or any doubt, or a suspicion that after all they may be innocent, but only beyond a reasonable doubt. It is difficult to define a reasonable doubt more clearly than those words themselves express. The Courts say that a reasonable doubt means that there is something in the evidence, or something lacking in the evidence, that causes you to pause, as honest jurors endeavoring to do justice between the accused and the Government and to say to yourself that you doubt the guilt of the defendants; but that is not enough; it must also cause you to go further and say to yourself as intelligent men that it is reasonable to doubt the guilt of the defendants. Another way to define reasonable doubt is that after you have reviewed all the evidence, if you have not an abiding conviction (that is to say, a judgment that persists in staying with you) that to a moral cer-

tainty (that is to say, to a high degree of probability) they are guilty, you have what the law terms a reasonable doubt and are bound to acquit them. On the [22] other hand, if after you have reviewed all the evidence you have a settled judgment that persists in staying with you that to a high degree of probability the defendants are guilty, you have no reasonable doubt, and it is equally your duty to convict them.

You are the sole and exclusive judges of the credibility of the witnesses, and of the weight to be given to evidence. You see the witnesses, you observe their demeanor, the fashion in which they testify; whether their statements are reasonable or unreasonable. That which is reasonable is generally a pretty good test of the truth. You also take notice of whether the witnesses appeared to be biased or prejudiced, or that they have an interest or motive to serve; whether they are contradicted by facts or by other witnesses, or whether they are contradicted by circumstances. You are not bound to believe anything a witness says simply because he swears it is so. My honored predecessor, Judge Knowles, used to explain that to the jury in this fashion: "Just because a witness swears it is so, you do not need to believe it unless it recommends itself to your judgment. A witness may come on the witness-stand and testify that he saw an elephant climb a telegraph-pole. You are not obliged to believe him even if he takes you down and shows you the post." Remember, it is for you to determine where the truth is among the witnesses. All witnesses are

presumed to speak the truth. The office of a witness is nothing but to aid you to arrive at the truth. If he departs from that office you are not obliged to give him the benefit of any presumption that he speaks truthfully. The presumption that he speaks the truth does not prevail where two witnesses flatly contradict each other. That has happened here. They both cannot speak the truth, there is no presumption, and you determine which of those conflicting witnesses speak the truth. There is another [23] rule of law that if a witness testifies falsely in any one particular you are at liberty to mistrust all the balance of the testimony of that witness. If he testifies falsely in one particular, whether by mistake or wilfully, he may have testified falsely in other particulars. If you believe the witness has testified falsely in any one particular, if your judgment approves, you may reject all the testimony of that witness as unreliable.

When the defendants testify in their own behalf, in so far as they are not contradicted by circumstances or other witnesses, they are entitled in the beginning to that same presumption that they speak the truth; but remember you may see in their testimony, or demeanor, or their interest, or in circumstances, reasons why they are not entitled to that presumption that they speak the truth. Never forget that the defendants are interested. They are charged with serious offenses, consequences will be grave to them if they are convicted, and you ask yourselves whether they, or either of them, has departed from the truth in the hope to deceive you,

and to escape the consequences of their offending against the law, if they have offended.

Now, Gentlemen of the Jury, the evidence is fairly brief in this case. It seems that the officers undoubtedly secured information that someone was running a still up in this country on the border of Park and Gallatin counties, and they went out and searched. They came to a place where an old still apparently had been established, and recently removed. The debris evidenced it. Gilbert said the tracks that led from that old still, the wagon tracks, went up as far as they could go, and then the foot tracks lead on further and looked as tho they might have been a day or two old. They proceeded to follow and those tracks lead them to defendant McCurry's ranch some four or five miles away. The old still had been in a very wild country, rugged and wooded. As they came down to McCurry's ranch, Gilbert stated that he saw [24] smoke coming from a cottonwood grove, and from that grove he saw the defendant McCurry proceeding with his wagon toward the barn. One of them went down to the barn, possibly both, and they proceeded to arrest McCurry. Gilbert went down to that grove and he found a still in operation, this particular still that is before you, and a large quantity of mash, some seven or eight or ten tubs of 25 or 30 gallons each. The still was on a big fireplace, fire under it, and Gilbert said defendant Wall was there stirring the mash in the still. He also found some 30 gallons of moonshine liquor, which would indicate that still had been running some little time.

The mash and the liquor may have been made somewhere else and carried there. The mash was there and tests of the liquor showed that it was 30 per cent proof, which would be about 15 per cent of alcohol, very highly intoxicating, and intoxicating liquor within the meaning of this law. Furthermore, near this still a few yards, I don't remember how many, possibly fifty, near this still was a tent and in that tent was the defendant Wall's wife and a couple of little children. They proceeded up to the barn where they had already arrested McCurry, and there was some search made, just how much was not stated. Nothing apparently was found; apparently no liquor; no evidence of any, but there was a buggy standing within a few feet of defendant McCurry's house. In that buggy were some jugs which had evidently had moonshine in them.

There is some relationship between these defendants. The brother of defendant McCurry is married to a sister of the defendant Wall, a relationship which at least would create possibly great friendliness, and undoubtedly great friendliness existed between these defendants.

This grove was on the defendant McCurry's place, who claims to be a rancher and stockgrower, and within sight of his house, where it was carried on.
[25]

Now, from the evidence the Government asks you to infer that these defendants had made the mash; had the still in their custody and were in the business of distillers, and the Court will say to you that the evidence will sustain that inference. The Court

does not say that you should draw that inference, that is left for you to say, but in the eyes of the law the evidence is sufficient to go to you and upon it you can determine that these two men are guilty, if your judgment approves. It is left entirely to your judgment, not to the Court's. If the evidence did not warrant a verdict of guilty, the Court would never submit the case to you.

Defendants testified, both testified, that they knew nothing of the old still; they knew nothing of the new still until Wall came into contact with it the day the officers were there. It was a coincidence, according to his statement, that he came to McCurry's place the night before, and went to pick berries down to this grove where this still was. Wall testified that a man named Bradley was running the still. Wall testified he was there twice, once in the afternoon when Gilbert found him, when Bradley was out for a load of wood. Wall first told you that he couldn't say whether he was stirring the mash or not; finally he said he was not stirring the mash, thus placing himself in flat contradiction to the testimony of Gilbert. Did Gilbert tell you the truth, or did Wall fear that if he was stirring the mash, it would be taken as evidence against him, and did he deny it in the hope to deceive you? Has Gilbert any purpose to serve by stating these incriminating circumstances, or has Wall an interest to serve by denying it? The still on the land of McCurry's, in view of all the circumstances, is sufficient to warrant you in finding that both he and Wall were in the possession of the still, and operating it to-

gether, having made the mash in the business of distillers. I say it will warrant you. I say also it is for you to determine whether you will draw that inference. [26]

McCurry tells you that he never knew anything about the still. He tells you that he was not down to the grove there, when Gilbert says he was. He puts himself into flat contradiction to Gilbert. The question will be for you to determine who is telling the truth. Mrs. Meeker testified that McCurry had warned her not to go up that gulch where the old still had been; told her there was vicious wolves and bears. McCurry denied that. He said he never told her anything of that sort. Why should Mrs. Meeker testify to that if that is not so. Why should McCurry deny it if it is so? Is it so? Is Mrs. Meeker telling the truth and does McCurry deny it lest otherwise the warning be taken as attempts to prevent her discovery of the old still? Was he endeavoring to keep her from hunting cows in that neighborhood for fear that she should discover this old still, or is he telling the truth? Remember his interest, and ask yourselves what is her motive to deceive you.

McCurry further says that the buggy in which the jugs were was not his; they belonged to a man named Pincox. It is true that he has not brought Pincox here. Possibly he would be justified in any event because Pincox could not be asked to incriminate himself. He said he was not at the grove. I think he said he was down near there making hay with Smith. You observed Smith didn't corroborate him in that particular. It is a circumstance to be noted.

If the buggy was his and his jugs smelling of moonshine, it is a circumstance to be considered in connection with all of the others.

You must remember, Gentlemen of the Jury, in weighing evidence and in endeavoring to determine where the truth lies, you do not look at one circumstance alone and dispose of it and say we will throw this out, and not consider it, and then go to other circumstances and thus dispose of one at a time. Very often cases are proved by circumstances, not one of which alone would be [27] sufficient to warrant a conviction, but when you view them altogether are convincing of guilt. Remember that when you are considering this evidence.

It appears in the proof these defendants are from the southern country, where it is a matter of history that there is a habit of putting stills out in the brushes. There is evidence as to the length of time that the still was down at the grove. Gilbert said that apparently the posts that were put down indicated it might have been there a week; either had been there some time or the materials were brought there from some place. Either that mash was made there or hauled there, either of which might have been done. It is a question for you to determine whether these defendants had this still in a remote section, and whether they finally becoming bolder, they would bring it down closer to McCurry's place.

The evidence is before you. The case goes to you now for you to make up your judgment. The Court will conclude as it began, that these defendants are presumed to be innocent, and that presumption re-

quires that you acquit them unless after your review of all the evidence you believe it is overcome to a degree that satisfies you that they are guilty beyond a reasonable doubt; and if you are satisfied that they are guilty beyond a reasonable doubt it is your duty to convict them.

When you retire to your jury-room you will select one of your number foreman and proceed to a verdict. It takes twelve of your number to agree upon any verdict in this case.

The Court overlooked one matter. Counsel was arguing; he proceeded to lay down his view of the law that you could not convict on suspicion. That is true, Gentlemen of the Jury, but he went on to say that you could not convict on probabilities, and there the Court interrupted him, and stated that that was not the law. That [28] is not the law, because after all, all cases are determined upon probabilities. There is no such thing as absolutely proving the guilt of the defendants, and guilt never needs to be proven to an absolute certainty because that is impossible. It needs only be proven to that high degree of probability that creates in your minds an abiding conviction to a moral certainty that he is guilty. In this court you are dealing with the law of the United States. That law is that when you form from the evidence a judgment that persists in staying with you that to a high degree of probability the defendant is guilty, you have no reasonable doubt, the law is satisfied, and it is your duty to convict. But counsel had in mind other law that he was stating to you. I simply state that so that

you will not believe that counsel was attempting to distort the law. That is not the duty of any counsel. The duty of every counsel is to aid the jury to an honest consideration of the case and a just conclusion. Counsel for the defendant and the Government owe their first duty to the administration of justice and not to their client.

By Mr. O'CONNOR.—We take exception to the instruction of the Court wherein the Court advises the jury that the evidence tending to show a probability of the guilt of the defendants is sufficient to warrant a conviction.

By the COURT.—Well, the Court didn't put it that way, but the Court is satisfied as it stated it, and your objection and exception in that form will be noted.

The jury came into court for further instruction, asking whether it could consider that there was no evidence of defendants' failure to register the still and to file bond; thereupon the Court instructed that in this case, as in all illicit liquor cases, the prosecution need prove only the circumstances from which can be presumed lack of registry and bond filed, whereupon the burden shifted to defendants to prove registry and bond filed. That in [29] this case the circumstances in evidence on the part of the United States, in respect to the still, raised such presumption which was full and complete proof. That the Government did not register stills in cottonwood groves in remote places and of the poor character of this, nor allow bonds therefor. That to remember, too, that defendants denied all

ownership or operation of the still or any interest or participation therein, to relieve themselves of any duty to register or file bond and as a defense to failure therein. That if they registered and filed bond, no one knew it better than they did and they easily could have so testified. That in the circumstances the burden was on defendants to submit this evidence and they had not, and the presumption was that they had not registered or filed bond, which presumption or inference was complete proof of the failure charged against them; and the jury ought to so find.

Thereupon defendants objected and excepted to so much of the instruction as advised the jury that the burden is on defendants to show registration of the still and filing of bond.

MILLER, O'CONNOR & MILLER,

By A. C. PELLETER,

Attys. for Defts.

Service of the foregoing bill of exceptions and receipt of copy thereof hereby acknowledged this — day of February, 1921.

District Atty.

Corrected to accord with facts and to render sensible, and approved and settled June 30th, 1921.

BOURQUIN,

J.

Filed July 2d, 1921. C. R. Garlow, Clerk. [30]

Thereafter, on July 8th, 1921, petition for writ of error was duly filed herein, as follows, to wit.
[31]

In the District Court of the United States, District
of Montana, Helena Division.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.

RAY McCURRY and JOHN WALL,
Defendants.

**Petition for Writ of Error and for Supersedeas and
Bail.**

To the Honorable District Court of the United
States, District of Montana:

And now come Ray McCurry and John Wall, the defendants in the above-entitled cause, and feeling themselves aggrieved by the verdict of the jury and the judgment of the District Court of the United States, for the District of Montana, entered on the 17th day of January, 1921, hereby petition for an order allowing them, said defendants, to prosecute a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States, for the District of Montana; that said writ of error may be made a supersedeas, and that your petitioners be released on bail in an amount to be fixed by the judge thereof pending the final disposition of said writ of error. As-

signment of errors is filed with this petition.

RAY McCURRY and
JOHN WALL.

By MILLER, O'CONNOR & MILLER,
Their Attorneys.

Filed July 8, 1921. C. R. Garlow, Clerk. [32]

Thereafter, on July 8th, 1921, assignment of errors was duly filed herein, as follows, to wit: [33]

In the District Court of the United States, District
of Montana, Helena Division.

RAY McCURRY and JOHN WALL,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Assignment of Errors.

And now come Ray McCurry and John Wall, the plaintiffs in error, and each for himself and in connection with his petition for a writ of error jointly with the other, says: That in the record, proceedings and judgment aforesaid error has intervened to his prejudice, to wit:

First. The District Court of the United States for the District of Montana erred in instructing the jury in the trial of said cause that evidence tending to show the probability of guilt of the defendants was sufficient to warrant a conviction, to the giving

of which instruction the defendants excepted before the going out of the jury.

Second. The District Court of the United States for the District of Montana erred in instructing the jury that the burden was upon the defendants to show the registration of the still and the filing of the bond, to the giving of which instruction the defendants excepted before the going out of the jury.

Third. The said Court erred in refusing to give an instruction asked by the defendants reading as follows:

“You are instructed that mere suspicions or probabilities, however strong, are not sufficient to warrant a conviction.”

Fourth. The said Court erred in rendering and entering judgment against the defendants. [34]

WHEREFORE said plaintiffs in error pray that the said judgment of the District Court of the United States for the District of Montana may be reversed and held for naught.

MILLER, O'CONNOR & MILLER,
Attorneys for Petitioners.

Filed July 8, 1921. C. R. Garlow, Clerk. [35]

Thereafter, on July 8th, 1921, order allowing the writ of error was filed herein, as follows, to wit:
[36]

In the District Court of the United States, District
of Montana, Helena Division.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.

RAY McCURRY and JOHN WALL,
Defendants.

**Order Allowing Writ of Error and Admitting
Defendants to Bail.**

Let a writ of error issue from the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the District of Montana, as prayed for in the petition of the said Ray McCurry and John Wall; and that a citation be issued to the defendant in error.

And, it now appearing that a citation has been served in said cause, IT IS NOW ORDERED, that a writ of error, allowed as above stated, operate as a supersedeas, and that defendants be admitted to bail, upon furnishing a bond in the penal sum of One Thousand Dollars, conditioned according to law, to be approved by me, said bond to operate also as a bond on error as well as a bail bond.

BOURQUIN,
Judge.

Filed July 8, 1921. C. R. Garlow, Clerk. [37]

Thereafter, on July 14th, 1921, bond on writ of error was duly filed herein, as follows, to wit: [38]

In the District Court of the United States in and
for the District of Montana.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

RAY McCURRY and JOHN WALL,
Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Ray McCurry and John Wall, of the county of Park, State of Montana, as principals, and John Hogan, J. E. Swindlehurst, J. W. Jamieson, J. T. McCurry, as sureties, are held and firmly bound unto the United States of America in the full and just sum of One Thousand (\$1,000.00) Dollars, to be paid to the United States of America, which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 12th day of July, in the year one thousand nine hundred and twenty-one.

Whereas, lately on the 17th day of January, 1921, at the term of the District Court of the United States for the District of Montana, in a cause pending in said court between the United States of America, plaintiff, and Ray McCurry and John

Wall, defendants, a judgment and sentence was rendered against said Ray McCurry and John Wall, and said Ray McCurry and John Wall obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the United States of America, citing and admonishing the United States of America to be and appear thirty days from and after the date thereof, which citation has been fully served.

Now, therefore, the conditions of said obligation is such that if the said Ray McCurry and John Wall shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, and shall appear in person in the [39] United States Circuit Court of Appeals for the Ninth Circuit when said cause is reached for argument, or when required by law or rule of said Court, and from day to day thereafter in said court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by said Court of Appeals in said cause, and shall surrender themselves in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against them shall be affirmed, and if they shall appear for trial in the District Court of the United States for the District of Montana, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against them shall be

reversed by the United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force and effect.

JOHN WALL,

RAY McCURRY,

Principals.

JOHN HOGAN.

J. E. SWINDLEHURST.

J. W. JAMIESON.

J. T. McCURRY.

The foregoing bond on error is hereby approved this 14th day of July, 1921.

W. H. MEIGS,

Assistant U. S. Attorney. [40]

State of Montana,

County of Park,—ss.

John Hogan, J. E. Swindlehurst and John W. Jamieson, whose names are subscribed as the sureties to the foregoing bond or undertaking, being severally duly sworn, each for himself, deposes and says that he is worth the sum in the said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

JOHN HOGAN.

J. E. SWINDLEHURST.

J. W. JAMIESON.

Subscribed and sworn to before me this 13th day of July, 1921.

JAMES F. O'CONNOR,

Notary Public for the State of Montana, Residing at Livingston, Montana.

My commission expires Feb. 11, 1922.

Filed July 14th, 1921. C. R. Garlow, Clerk. [41]

Thereafter, on July 14th, 1921, a citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [42]

In the District Court of the United States, District of Montana, Helena Division.

RAY McCURRY and JOHN WALL,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Citation on Writ of Error.

The President of the United States to the United States of America, GREETING: To the United States of America.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, within 30 days from the date of this writ, pursuant to a writ of error allowed by the District Court of the United States in and for the District of Montana, and filed in the clerk's office of said Court on the 14th day of July, 1921, in a cause wherein Ray McCurry and John Wall are plaintiffs in error and the United States of America is defendant in error, to show

cause, if any, why the judgment and sentence rendered against the said plaintiffs in error should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States in and for the District of Montana, this 14th day of July, 1921.

BOURQUIN,
District Judge.

[Seal]

Attest: C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy. [43]

Due personal service of within citation made and admitted and receipt of copy acknowledged this 14th day of July, 1921.

W. H. MEIGS,
Attorney for U. S.

[Endorsed]: No. 3674. In the District Court of the United States in and for the District of Montana, Helena Division. Ray McCurry et al., Plaintiffs in Error, vs. The United States of America, Defendant in Error. Citation. Filed July 14th, 1921. C. R. Garlow, Clerk. By ———, Deputy Clerk. [44]

Thereafter, on July 14th, 1921, writ of error was duly issued herein, which original writ is hereto annexed and is in the words and figures following, to wit: [45]

In the District Court of the United States, District of Montana, Helena Division.

RAY McCURRY and JOHN WALL,
Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana, and to the District Court of the United States for the District of Montana, GREETING:

BECAUSE in the record and proceedings, and also in the rendition of the judgment, of a plea which is in said District Court, before you, between the United States of America, plaintiff, and Ray McCurry and John Wall, defendants, manifest error hath occurred and happened to the said defendants Ray McCurry and John Wall, as by their petition for a writ of error and assignment of errors appears, we, being willing that such error, if any there hath been, should be duly corrected, and

full and speedy justice done to the parties aforesaid, in this behalf, do command you if judgment therein given that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ in said Circuit Court of Appeals, to be then and there held, that, the records and proceedings aforesaid, being inspected, the said Circuit Court of Appeals [46] may cause further to be done therein to correct that error what if right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 14th day of July, A. D. 1921, and of the Independence of the United States the one hundred and forty-sixth.

[Seal]

C. R. GARLOW,
Clerk of the District Court of the United States,
District of Montana.

By H. H. Walker,
Deputy.

Due personal service of the foregoing writ of error made and admitted and receipt of a copy

thereof acknowledged this 14th day of July, A. D. 1921.

W. H. MEIGS,
Asst. United States District Attorney for the Dis-
trict of Montana. [47]

Answer of Court to Writ of Error.

The Answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of the said District Court of the United States, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

C. R. GARLOW,
Clerk. [48]

[Endorsed]: No. 3674. In the District Court of the United States in and for the District of Montana, Helena Division. Ray McCurry and John Wall, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed July 14th, 1921. C. R. Garlow, Clerk. By _____, Deputy Clerk. [49]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 49 pages, numbered consecutively from one to 49, inclusive, is a full, true and correct transcript of the record and all proceedings had in said cause, and the whole thereof, as appears from the original record and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of seventeen and 45/100 Dollars (\$17.45), and have been paid by the plaintiff in error.

WITNESS my hand and the seal of said court at Helena, Montana, this 30th day of July, A. D. 1921.

[Seal]

C. R. GARLOW,

Clerk. [50]

[Endorsed]: No. 3747. United States Circuit Court of Appeals for the Ninth Circuit. Ray McCurry and John Wall, Plaintiffs in Error, vs.

United States of America, Defendant in Error.
Transcript of Record. Upon Writ of Error to the
United States District Court of the District of Mon-
tana.

Filed August 9, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RAY McCURRY and JOHN WALL,
Plaintiffs in Error.

—vs.—

UNITED STATES OF AMERICA,
Defendant in Error.

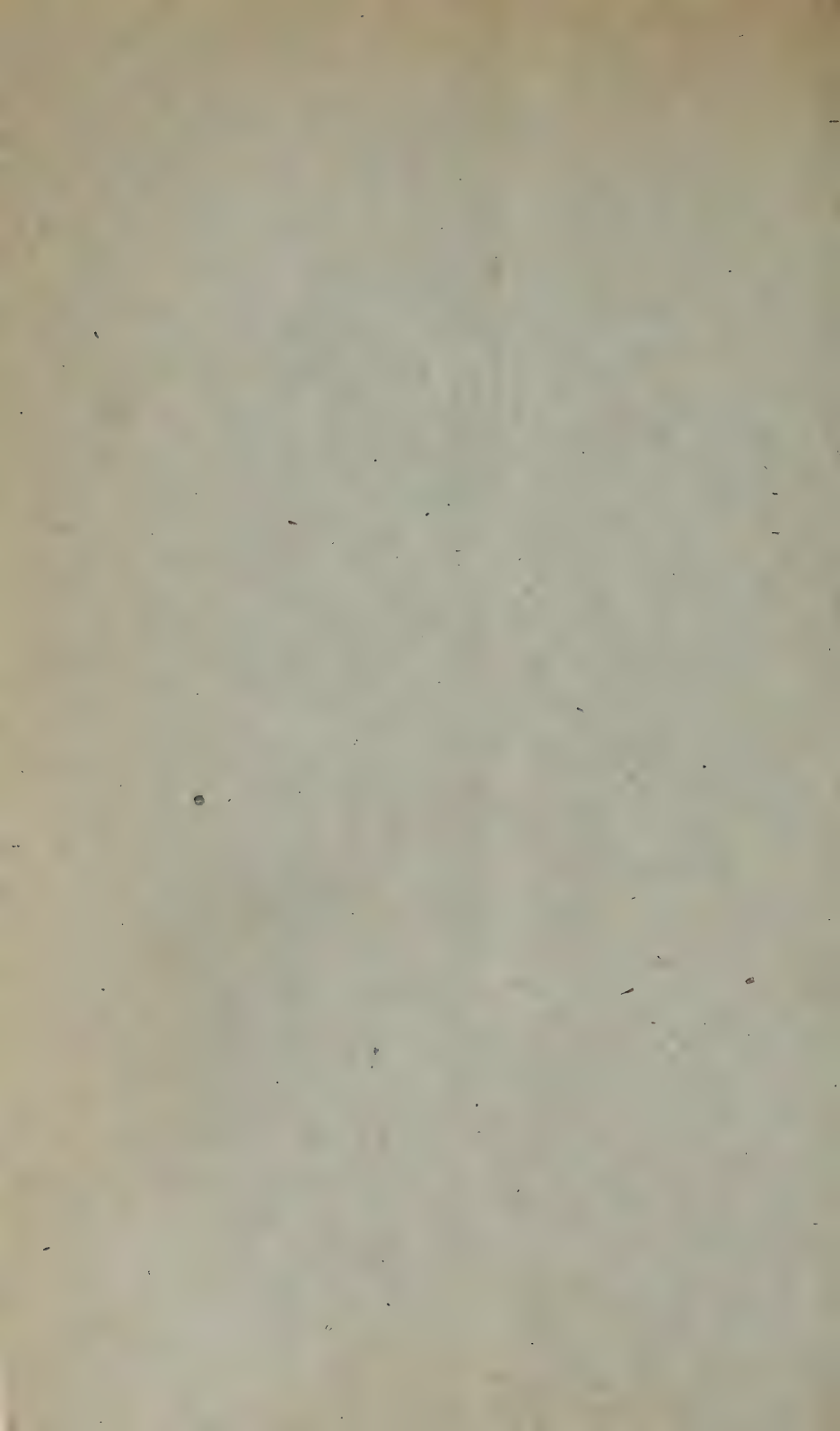
BRIEF OF PLAINTIFFS IN ERROR

MILLER, O'CONNOR & MILLER,
Attorneys for Plaintiffs in Error.

FILED

OCT 11 1921

F. D. MONCKTON,
CLERK.



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RAY McCURRY and JOHN WALL,
Plaintiffs in Error.

—vs.—

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

The plaintiffs in error were indicted by the Grand Jury on three counts, which indictment is set forth in Transcript at pages 1, 2, 3, 4 and 5 and to which they entered pleas of Not Guilty.

On the 17th day of January, 1921, the cause came on regularly for trial and the plaintiffs in error were by the jury found guilty on counts two and three and not guilty as to count one. The plaintiffs in error, being present in Court, judgment was entered as follows: 'It is therefore CONSIDERED, ORDERED, AND ADJUDGED that for said offense you, the said Ray McCurry and John Wall, each be confined,

and imprisoned in the county jail at Helena, Montana, for the term of Nine Months, and you, the said Ray McCurry, pay (10) a fine of Five Hundred Dollars, and costs taxed at \$170.90, and you, the said John Wall, pay a fine of Two Hundred Dollars, and costs taxed at \$170.90, and that you be confined in said county jail until said fines are paid or you are otherwise discharged according to law. Thereupon, on motion of defendants, and for good cause, commitment ordered stayed for twenty days.

Thereafter, on February 17, 1921, Notice of Motion and Motion for New Trial was duly filed, which said Motion was, on July 2, 1921, denied.

On July 2, 1921, the Bill of Exceptions was duly settled and allowed and filed as set forth in Transcript at page 14.

On July 8, 1921, the plaintiffs in error petitioned for Writ of Error and for Supersedas and Bail, Transcript page 29.

ASSIGNMENT OF ERRORS.

In said petition for Writ of Error, the following assignment of error was made:

First. The District Court of the United States for the District of Montana erred in instructing the jury in the trial of said cause that evidence tending to show the probability of guilt of the defendants was sufficient to warrant a conviction, to the giving of which instruction the defendants excepted before going out of the jury.

Second. The District Court of the United States for the

District of Montana erred in instructing the jury that the burden was upon the defendants to show the registration of the still and the filing of the bond, to the giving of which instruction the defendants excepted before the going out of the jury.

Third. The said Court erred in refusing to give an instruction asked by the defendants reading as follows:

“You are instructed that mere suspicions or probabilities, however strong, are not sufficient to warrant a conviction.”

Fourth. The said Court erred in rendering and entering judgment against the defendants.

On July 8, 1921, order allowing the Writ of Error and admitting the defendants to bail was made.

ARGUMENT.

Taking up the assignment of errors in the order stated it is first claimed that the court erred in instructing the jury in the trial of said cause that evidence tending to show the probabilities of guilt of the defendants was sufficient to warrant a conviction. It is considered that prejudicial error was committed in that the jury could have received the wrong impression from the remarks of the court, Transcript page 26, wherein he stated: “That is not the law because after all, all cases are determined upon probabilities.” Counsel contends that he did correctly state the law and in support thereof cites the case of *State vs. Riggs*, 56 Montana, 399, wherein the court said: “Defendant may not be convicted on conjectures however *shrewd*, on suspicions however justified, on probabilities however strong, but only upon evidence which establishes guilt

beyond a reasonable doubt; that is, upon proof such as to logically compel the conviction that the charge is true." Counsel insists that he did not mis-state the law when he remarked that the jury could not convict on probabilities and that there was error committed by the court when it interrupted him and stated that that was not the law. It would seem that the court did no go so far in his statement of the law as did the Supreme Court in Dunbar's case, 156 U. S. 199, wherein the following rule was laid down: "I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt—that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as not to exclude all doubt or possibility of error, but as to exclude reasonable doubt," it gave all the definition of reasonable doubt which a court can be required to give, and one which probably made the meaning as intelligible to the jury as any elaborate discussion of the subject would have done. While it is true that it used the words "probabilities" and "strong probabilities," yet it emphasized the fact that those probabilities must be so strong as to exclude any reasonable doubt, and that is unquestionably the law. *Hopt v. Utah*, 120 U. S. 430, 439 (30; 708, 711); *Com. v. Costley*, 118 Mass. 1, 23.

In the next instance, it is urged that the District Court erred in instructing the jury that the burden was upon the de-

fendants to show the registration of the still and the filing of the bond. To this charge, the plaintiffs in error object for the reason that it is the law that in criminal cases the burden of proof never shifts. It seems that the case of *Davis vs. U. S.* 160 U. S. 469, should be conclusive upon this point. The Supreme Court of the United States speaking through Justice Harlan, says: 'strictly speaking, the burden of proof as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the guilt for which he is indicted; it is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.' As applied to this case, the above rule would demand that the prosecution prove the registration or lack of registration of the still and the filing or lack or filing of the bond. This proof could have been readily produced from the records of the Internal Revenue Department and it is the contention here that it was not incumbent upon the plaintiffs in error to testify in this regard and that no presumption could be taken against them for failure to testify. There is no better settled rule of law than that the defendant is clothed with a presumption of innocence from the beginning until such time that he is deemed guilty beyond a reasonable doubt and that his failure to testify in his own behalf does not raise a presumption or inference against him. It has many times been held a prejudicial error where the prosecuting attorney has been allowed to comment upon the failure of the defendant to testify and the courts have been very emphatic in stating that no presumption could be

raised against the defendant therefore. State vs. Cameron, 40 Vermont, 555; Commonwealth vs. Maloney 113, Mass. 211.

For the reasons above stated, the plaintiffs in error respectfully urge that the order denying their Motion for a New Trial should be reversed and that the judgment herein in favor of the defendant in error should be reversed.

MILLER, O'CONNOR & MILLER,
Attorneys for Plaintiffs in Error.

**In the
United States
Circuit Court of Appeals
For the Ninth Circuit**

RAY McCURRY and JOHN WALL,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error

Brief of Defendant in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
DISTRICT OF MONTANA

Appearances:

JOHN L. SLATTERY,

United States Attorney.

RONALD HIGGINS,

Assistant United States Attorney.

WELLINGTON H. MEIGS,

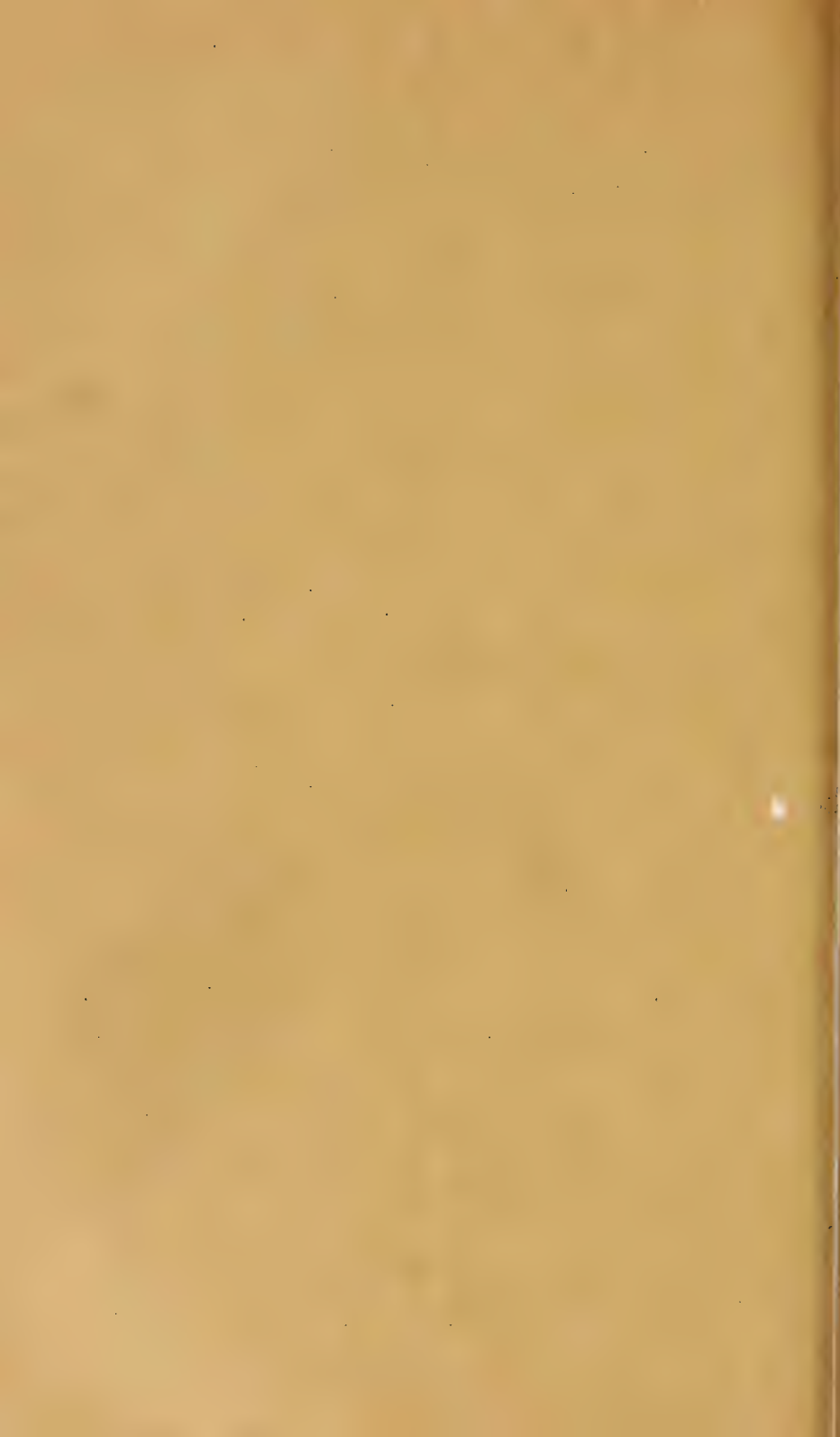
Assistant United States Attorney.

Attorneys for Defendant in Error.

FILED

OCT 10 1921

F. D. MONCKTON,



In the
United States
Circuit Court of Appeals
For the Ninth Circuit

RAY McCURRY and JOHN WALL,
Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

STATEMENT OF THE CASE

Plaintiffs in error are in default in that they have not served or filed within the time prescribed by the rules their brief herein, but it is deemed proper to set forth a statement of the case in the event the court should decide to overlook the infraction of the rules.

On October 28, 1920, an indictment in three counts was presented and filed in the District Court of the United States for the District of Montana, charging plaintiff in error with having made and fermented a certain mash fit for the production of spirits on prem-

ises other than a distillery duly authorized according to law; and with having failed and neglected to register a certain still, set up, which they had in their possession and custody; and with having carried on the business of distillers without having given the bond required by law. (R. 2-5), The plaintiffs in error pleaded not guilty, (R. 6), and were tried on January 17, 1921 (R. 6-7) and were found guilty as to counts two and three and not guilty as to count one. (R. 8.) On January 17, 1921, judgment was entered against plaintiffs in error, each receiving a sentence of nine months imprisonment, and McCurry being fined \$500.00 and costs and Wall being fined \$200.00 and costs (R. 8-9.) Subsequently plaintiffs in error served notice of motion for a new trial (R. 10-11), and on July 2, 1921, said motion was denied (R. 11-14,) On the same day the bill of exceptions was duly settled and allowed and filed (R. 14-28), and thereafter petition for writ of error and for supersedeas and bail was filed (R. 29-30); also an assignment of errors (R. 30-31.) An order was made allowing the writ of error and admitting to bail (R. 32), and a bond was filed by plaintiffs in error in support of the writ of error (R. 33-35.) Citation on writ of error was issued July 14, 1921 (R. 36-37); also writ of error (R. 38-39.) The court made answer to the writ of error (R. 40) and the certificate of the Clerk of the lower court to the transcript of record is appended (R. 41-42).

ARGUMENT

Four errors are assigned (R. 30-31.) The first is that the court erred in instructing the jury that evidence tending to show the probability of guilt of the defendants was sufficient to warrant conviction; second, that the court erred in instructing the jury that the burden was upon defendants (Plaintiffs in error) to show the registration of the still and the filing of the bond; third, that the court erred in refusing to give an instruction asked by the defendants; and, fourth, that the court erred in rendering and entering judgment against the defendants (plaintiffs in error).

I.

As to the third error assigned, it is sufficient only to call the attention of the court to the fact that the bill of exceptions does not disclose that the instruction set forth in the assignment of errors was offered by plaintiffs in error, or that any exception was saved to the refusal of the court, if the court did refuse, to give the same.

II.

As to the fourth error assigned, namely, that the court erred in rendering and entering judgment against the defendants, it is submitted that such an assignment is too general to warrant review by the court. See *Collins v. United States*, 219 Fed. 670, (C. C. A. 8th), p. 674, in which case there was an assignment of errors as follows:

“ . . . because the court erred in entering judgment herein against the defendant and in favor of the United States of America.”

The Circuit Court of Appeals said:

“This is too general to present a question for review. See *Scholey v. Rew*, 23 Wall. 331, 345, 23 L. Ed. 99; *Texas and Pacific R. Co. v. Archibald*, 170 U. S. 665, 668, 18 Supt. Ct. 777, 42 L. Ed. 1188.”

III.

The instructions given by the court with reference to reasonable doubt are clear and are in accord with the rules laid down by the weight of authority. We quote from the court's instructions:

“The defendants having plead not guilty, that imposes upon the Government the burden of proving to your satisfaction that they are guilty beyond a reasonable doubt before you can justly convict them.” (R. 17) you weigh the evidence against them and for them to determine whether or not that presumption of innocence is overcome, and to a degree that satisfies you that they are guilty beyond a reasonable doubt. (R. 17). Whenever the presumption of innocence has been overcome by the evidence to that degree that you are satisfied that they are guilty beyond a reasonable doubt, the presumption of innocence disappears from the case and it will be your duty to find them guilty, (R. 18.) When I say the Government must prove them guilty beyond a reasonable doubt, you take into consideration also the evidence that the defendants have submitted in their own behalf, and weighing it all together, considering it altogether determine whether or not they are guilty beyond a reasonable doubt. Remember that the proof before they can be found guilty is only that they are guilty beyond a reasonable doubt. Not beyond all doubt or any doubt, or a suspicion that after all they may be innocent, but only beyond a reasonable doubt. It is difficult to

define a reasonable doubt more clearly than those words themselves express. The Courts say that a reasonable doubt means that there is something in the evidence, or something lacking in the evidence, that causes you to pause, as honest jurors endeavoring to do justice between the accused and the Government and to say to yourself that you doubt the guilt of the defendants; but that is not enough; it must also cause you to go further and say to yourself as intelligent men that it is reasonable to doubt the guilt of the defendants. Another way to define reasonable doubt is that after you have reviewed all the evidence, if you have not an abiding conviction (that is to say, a judgment that persists in staying with you) that to a moral certainty (that is to say, to a high degree of probability) they are guilty, you have what the law terms a reasonable doubt, and are bound to acquit them. On the other hand, if after you have reviewed all the evidence you have settled judgment that persists in staying with you that to a high degree of probability the defendants are guilty, you have no reasonable doubt, and it is equally your duty to convict them. (R. 18-19)

The evidence is before you. The case goes to you now for you to make up your judgment. The Court will conclude as it began, that these defendants are presumed to be innocent, and that presumption requires that you acquit them unless after your review of all the evidence you believe it is overcome to a degree that satisfies you that they are guilty beyond a reasonable doubt; and if you are satisfied that they are guilty beyond a reasonable doubt it is your duty to convict them. (R. 25-26) The Court overlooked one matter. Counsel was arguing; he proceeded to lay down his view of the law that you could not convict on suspicion. That is true, Gentlemen of the Jury, but he went on to say that you could not convict on probabilities, and there the Court in-

interrupted him, and stated that that was not the law. That is not the law, because after all, all cases are determined upon probabilities. There is no such thing as absolutely proving the guilt of the defendants, and guilt never needs to be proven to an absolute certainty because that is impossible. *It needs only be proven to that high degree of probability that creates in your minds an abiding conviction to a moral certainty that he is guilty.* In this court you are dealing with the law of the United States. That law is that when you form from the evidence a judgment that persists in staying with you that to a high degree of probability the defendant is guilty, you have no reasonable doubt, the law is satisfied, and it is your duty to convict. (R. 26).

It is to be observed that plaintiffs in error excepted to only a detached portion of the instructions upon the proposition of reasonable doubt. Such an exception is not sufficient. The rule is that the charge must be considered as a whole. See *Charles v. United States*, 213 Fed. 707 (C. C. A. 4th), where it is said:

"It is well settled that a single sentence or even a lengthy paragraph in a charge cannot be treated as determining the correctness of the charge in its entirety; the proper method being to consider the charge as a whole, and if, when so considered, it appears that the court has clearly stated the law, a reversal will not be directed, even though it should appear that some portion of the same is subject to criticism."

See also, *May v. United States*, 157 Fed. 1, 6, (C. C. A. 9th) and *Horn v. United States*, 182 Fed. 721, 740, (C. C. A. 8th); also *Colt v. United States*, 190 Fed. 305, 308, (C. C. A. 8th); *LeMore et al v. United States*, 253 Fed. 887 (C. C. A. 5th) and *Peters v.*

United States, 94 Fed. 127; 36 C. C. A. 105.

In any event, the court's instructions were proper and correctly stated the law. There is no such thing as an absolute certainty, out of the domain of the exact sciences and actual observation. In most cases, the guilt of the accused must, of necessity, be deduced from a variety of circumstances, leading to proof of the fact. Always, there will be room for some doubt, according to the mental powers and the whims of those who weigh the evidence. As a matter of fact, then, the question of guilt largely becomes one of probability, since it is impossible to prove it with certainty. See *Hopt v. People*, 120 U. S. 430; 7 Sup. Ct. 614. The words "moral certainty" mean no more than "a high degree of probability"; else, why use the adjective "moral"?

The instruction complained of in the case of *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 330, and which was held to be proper in an opinion written by Mr. Justice Brewer, is very similar to that complained of in the case at bar. In the *Dunbar* case the instruction was as follows:

"I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt; that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded. It is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as

not to exclude all doubt or possibility of error, but as to exclude reasonable doubt.”

The court held that the trial court, in giving the above instructions to the jury,

“ gave all the definition of reasonable doubt which a court can be required to give, and one which probably made the meaning as intelligible to the jury as any elaborate discussion of the subject would have done. While it is true that it used the words “probabilities” and “strong probabilities”, yet it emphasized the fact that those probabilities must be so strong as to exclude any reasonable doubt, and that is unquestionably the law. *Hopt v. Utah*, 120 U. S. 430, 439, 7 Sup. Ct. 614; *Com. v. Costley*, 118 Mass. 1, 23.”

The language of Circuit Judge HUNT in the case of *Crane v. United States*, 259 Fed. 480, (C. C. A. 9th), is quite in point:

“The jury was told that defendant must be proved guilty beyond a reasonable doubt; that a reasonable doubt is that state of the case which, after the entire comparison and examination of all the facts and circumstances, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge. This definition was accompanied by a further instruction to the effect that the prosecution was not called upon to make a case free from any possible doubt by proving defendant’s guilt to an unassailable demonstration; that such proof was rarely obtainable in dealings with human transactions, and that there is hardly anything relating to human affairs that is not open to some possible or fanciful or imaginary doubt. Defendant excepted. Surely there was no error in the statement of the court.”

IV.

The remaining error alleged is that the court erred in instructing the jury that the burden was upon the defendants (plaintiffs in error) to show the registration of the still and the filing of the bond. This instruction is eminently proper, for it has long been the rule that the burden of evidence is on the defendant where the subject matter of a negative averment in the indictment or a fact relied upon by defendant as a justification or excuse relates to him personally, or otherwise lies peculiarly within his knowledge."

16 C. J. 530.

And, the language which we quote below from *Faraone v. United States*, 259 Fed. 507, (C. C. A. 6th), supports the rule. *Faraone* was convicted of carrying on the business of a retail liquor dealer without having paid the special tax required therefor by the Federal Law. In the course of the opinion, the court said:

"The government made no offer to prove the averment in the indictment that the special tax required by law was not paid, and the defendant made no reference to the subject in his testimony. It was evidently assumed by court and counsel that proof of such a negative averment is not required. The assumption was justified by the authorities and on reason. If payment had been made, the fact was peculiarly within defendant's knowledge, and he could have shown it without inconvenience. He could thereby have prevented any proceedings against him, or could have brought them to an end at any time. The subject is discussed at length in 2 Chamberlayne's Evidence, Sec. 983, with references to many cases.

See, also 1 Greenleaf on Evidence, Sec. 79 (16th Edition) and cases directly in point; Williams v. People, 121 Ill. 84, 11 N. E. 881; People v. Boo Doo Hong, 122 Cal. 602, 55 Pac. 402; State v. Foster, 23 N. H. 348, 55 Am. Dec. 191; State v. Shaw, 35 N. H. 217; Wheat v. State, 6 Mo. 455."

This point was also raised in the case of United States v. Turner, 266 Fed. 248, and in his decision overruling a demurrer to the indictment the district judge said:

"I assume that in a prosecution for transporting liquor without a permit the Government would not have to prove the want of the permit in order to make out a prima facie case. 16 C. J. 530; 1 Elliott Ev. Sec. 141; 4 Wigmore Ev. Sec. 2512."

See also 12 Cyc 381.

If plaintiffs in error had registered the still which they had set up, certainly that fact was peculiarly within their knowledge, and likewise, the giving of the bond, if one was given, before carrying on the business of distillers.

In any event, it is readily gathered from the instructions of the court (R. 27-28) that there was sufficient evidence before the jury to show beyond a reasonable doubt that plaintiffs in error neither registered the still nor gave the bond, because they denied all knowledge or operation of the still or any interest therein.

It is respectfully submitted that the judgment should be affirmed.

JOHN L. SLATTERY,
RONALD HIGGINS,
WELLINGTON H. MEIGS,
Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

T. C. CHOU and JEW BEN ON,
Appellants,
VS.

EDWARD WHITE, as Commissioner of Immigration,
at the Port of San Francisco,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

FILED
AUG 8 11 1927
F. D. MONGKTON,
CLERK

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For Petitioner and Appellant:

DION R. HOLM, Esq., San Francisco, California.

BERT SCHLESINGER, Esq., San Francisco, California.

SAMUEL C. WRIGHT, Esq., San Francisco, California.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Francisco, California.

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,154.

In the Matter of the Application of T. C. CHOU
for a Writ of Habeas Corpus for and on Behalf of JEW BEN ON.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

Sir: Please issue certified copies of the following proceedings, etc:

1. Petition for writ of habeas corpus.
2. Order to show cause therein.
3. Demurrer.
4. Order sustaining demurrer, denying petition and discharging order to show cause.
5. Notice of appeal.

6. Petition for appeal.
7. Order allowing appeal.
8. Assignment of errors.
9. Stipulation and order as to exhibits.
10. Praecipe for appeal and all minute orders of Court, except those of postponement.
11. Citation on appeal, original and copy.

DION R. HOLM,
BERT SCHLESINGER,
SAMUEL C. WRIGHT,

Attorneys for Petitioner and Detained, the Appellants. [1*]

[Endorsed]: Receipt of a copy of the within praecipe is hereby admitted this 7th day of July, 1921.

FRANK M. SILVA,
U. S. Attorney.

Filed Jul. 7, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

(No. 17,154.)

In the Matter of the Application of T. C. CHOU
for a Writ of Habeas Corpus for and on Be-
half of JEW BEN ON.

*Page-number appearing at foot of page of original certified Transcript of Record.

Petition for Writ of Habeas Corpus.

The petition of T. C. Chou respectfully shows:

I.

That your petitioner is a person residing at Berkeley, State of California, and is a friend of Jew Ben On, and a friend of Jew Ngow, father of the said Jew Ben On, and petitions this court for a writ of habeas corpus for and on behalf of Jew Ben On, who is unable to apply by reason of his unlawful detention, imprisonment and restraint at Angel Island, California. Jew Ngow is without the jurisdiction of this court.

II.

That the said Jew Ben On is unlawfully imprisoned, detained, confined and restrained of his liberty by Edward White, Commissioner of Immigration, who is a person who has the care, custody and control of the body of said Jew Ben On at the Immigration Station of the United States at Angel Island, California, in this Northern District of California, and is to be deported therefrom to China.

III.

That Jew Ben On was born in the Ung Sing Village, Hoy Ping District, China. That the said Jew Ben On made application for admission to the United States before the Commissioner of Immigration at Angel Island, California, having arrived at this [3] port November 26, 1920, ex S. S. "Tjikembang"; that Jew Ben On sought admission on the theory that he was the minor son of a lawfully domiciled merchant, to wit, Jew Ngow; that certain

proceedings were had before the Commissioner of Immigration at Angel Island on the 24th day of January, 1921, and that certain proceedings were had before the United States Immigration Commissioner, George W. Moore at Fresno, California, on or about December 18, 1920; that thereafter and on the 24th day of January, 1921, a Board of Special Inquiry, Angel Island, denied Jew Ben On the right to enter the United States, and Edward White, as Commissioner of Immigration, made a finding to the effect that Jew Ben On had not established his status sufficiently to enable him to enter the United States and would be granted a period of ten (10) days within which to produce any and all evidence he might have to establish his right to enter. This ten (10) days was waived by the said Jew Ben On and on January 29, 1921, the matter again came before the Board of Special Inquiry, Angel Island, California, and the said Jew Ben On's application was again denied by the said Board of Special Inquiry. Edward White thereupon entered his decision in writing, stating substantially that Jew Ben On had been denied entrance to the United States because the mercantile status of Jew Ngow had not been established to the satisfaction of the Board of Special Inquiry; that the Board of Special Inquiry and the Commissioner of Immigration admit Jew Ben On to be the true and lawful minor son of Jew Ngow. That on January 31, 1921, Edward White, as Commissioner of Immigration, formally denied Jew Ben On the right of entry *of* the United States and on February 3, 1921, an appeal was taken to the Sec-

retary of Labor at Washington, D. C., from this decision; on March 18, 1921, the Secretary of Labor affirmed the decision of Edward White as Commissioner of Immigration and ordered the appeal of [4] Jew Ben On dismissed and *and* ordered him deported to China.

IV.

The illegality of said imprisonment, detention, confinement and restraint of liberty of Jew Ben On consists of the following: That Inspector Moore, at Exeter, California, made false statements and resorted to subterfuge to obtain testimony to support the Commissioner of Immigration's contention finding that Jew Ngow was not in fact a merchant; that the two white witnesses from whom testimony was thus obtained are Angles H. Merryman and Blanche Baker; that on page 40 of the record as numbered before the Commissioner of Immigration at Angel Island the following appears in the report of Inspector Moore:

"Mrs. Merryman at first declined to admit the writer to her home or to discuss in any manner the personnel of her household servants without first consulting her husband. She was advised that a Chinese who is employed by her as a cook was endeavoring to have a son admitted to San Francisco and inasmuch as the applicant must pass inspection under the immigration laws as well as the Chinese Exclusion Act it would be well for the alleged father to show that he had steady employment and was in a position to support his son until such a time as he could find

self-supporting employment, if permitted to enter the country.”

That the hearing accorded Jew Ben On at Angel Island was unfair by reason of the Board of Special Inquiry taking into consideration the fact that Jew Ngow had been arrested while the application of his son was pending, and that the said Jew Ngow was charged with conspiracy to violate Section 11 of the Chinese Exclusion Act, and that the Board of Special Inquiry's decision was based upon the fact of a warrant being issued for Jew Ngow's arrest rather than the facts adduced at the various hearings; that full force and effect was not given by the Commissioner of Immigration or the Secretary of Labor to the treaties existing between the United States and China governing the immigration of Chinese, in this: that Jew Ngow was a lawfully domiciled resident of the United States and was a [5] resident herein in the year 1880, prior to the ratification of the treaty with China on July 19, 1881, and the passage of the first Chinese Exclusion Law, May 6, 1882; that Article 2 of said treaty provided that Chinese laborers who were then in the United States shall be allowed to come and go of their own free will and accord and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to citizens and subjects of the most favored nation; that Jew Ngow called to the attention of Edward White the Commissioner of Immigration prior to the case being forwarded to Washington, that he was in fact a lawfully domiciled resident of the United States prior to the ratification of the treaty with

China on July 19, 1881, and prior to the passage of the first exclusion law May 6, 1882, and offered as proof of this fact a Certificate of Residence issued to persons of Chinese descent who were in the United States prior to the ratification of the treaty or the passage of the first exclusion act; that said original Certificate of Residence is with the files and records of this case and is presumed to be before the Secretary of Labor at Washington, D. C.

That your petitioner prays that when said files and records are returned from the Secretary of Labor he be given the privilege of attaching copies of said files and records to this petition, and that the original files and records of all proceedings had before the Commissioner of Immigration at Angel Island and the Secretary of Labor be considered part of this petition.

V.

That the Board of Special Inquiry, the Commissioner of Immigration, and the Secretary of Labor erred in finding that Jew Ngow was not in fact a merchant; that the evidence adduced before the Commissioner of Immigration shows Jew Ngow [6] to have been financially interested in *bona fide* mercantile establishments throughout the State of California from the year 1899 down to and including the present date; that as a matter of law the said Jew Ngow is in fact a merchant having and having had for more than one (1) year last past a substantial financial interest in that certain concern known as the Emory Chow Company of Selma, California, and that the said Jew Ngow did in fact perform the

duties of a merchant as the term "merchant" is meant under the Chinese Exclusion Law.

WHEREFORE YOUR PETITIONER PRAYS that a writ of habeas corpus be issued by this Honorable Court directing and commanding the said Edward White, Commissioner of Immigration at the port of San Francisco, to have and produce the body of the said Jew Ben On before this Honorable Court at the Postoffice Building in the city and county of San Francisco, State of California, at a day and time certain to be fixed by this Court, or to show cause, if any he has, why the writ should not be granted in order that the alleged cause of the imprisonment and detention of said Jew Ben On may be examined into, so that if it be determined that said detention and imprisonment is unlawful and illegal, that the applicant was not given a fair hearing, that the said Jew Ben On may be discharged from the custody, *detentioned* and imprisonment. That a copy of this petition be served together with the order as prayed for upon the Commissioner of Immigration, Angel Island, California.

T. C. CHOU,
Petitioner.

DION R. HOLM,
Attorney for Petitioner. [7]

State of California,
City and County of San Francisco,—ss.

T. C. Chou, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof; that the same is true of his own

knowledge except as to matters therein alleged upon information and belief, and as to those matters that he believes it to be true.

T. C. CHOU.

Subscribed and sworn to before me this 1st day of April, 1921.

[Notary Seal] JOHN WISNOM,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Apr. 1, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [8]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

(No. 17,154.)

In the Matter of the Application of T. C. CHOU
for a Writ of Habeas Corpus for and on Be-
half of JEW BEN ON.

Order to Show Cause.

GOOD CAUSE APPEARING THEREFOR,
and upon reading the verified petition on file herein—

IT IS HEREBY ORDERED that Edward White,
Commissioner of Immigration for the Port of San
Francisco, and District of California, appear before
this Court on the 23d day of April, 1921, at the hour
of ten (10) o'clock A. M. of said day, to show cause,
if any he has, why a writ of habeas corpus should not
be issued herein as prayed for and that a copy of this

order and a copy of said petition be served upon the said Commissioner; and

IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration aforesaid, or whoever acting under the orders of said Commissioner and Secretary of Labor shall have the custody of Jew Ben On, are hereby ordered and directed to retain said Jew Ben On within the custody of the said Commissioner of Immigration and within the jurisdiction of this Court until further order herein.

Dated: April 1, 1921.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals, Ninth Circuit.

[Endorsed]: Filed Apr. 1, 1921. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [9]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,154.

In the Matter of JEW BEN ON, on Habeas Corpus.
Demurrer to Petition for Writ of Habeas Corpus.

Comes now the respondent, Edward White, Commissioner of Immigration, at the port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

FRANK M. SILVA,

United States Attorney.

BEN F. GEIS,

Asst. United States Attorney,

Attorneys for Respondent. [10]

Service of a copy of the within demurrer received this 24th day of June, 1921.

DION R. HOLM,

Atty. for Pet.

[Endorsed]: Filed Jun. 25, 1921. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [11]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 25th day of June, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 17,154.

In the Matter of JEW BEN ON, on Habeas Corpus.

Minutes of Court—June 25, 1921—Hearing on Order to Show Cause.

This matter came on regularly this day for hearing of order to show cause as to the issuance of a writ of habeas corpus herein. Dion R. Holm and S. C. Wright, Esqrs., were present as Attorneys for and on behalf of petitioner and detained. P. A. Robbins, Esq., was present for and on behalf of respondent, and filed demurrer to petition, and, all parties consenting thereto, it is ordered that the Immigration Records be filed as Respondent's Exhibits "A," "B," "C" and "D," and that the same be considered as part of the original petition. After argument by the respective attorneys, the Court ordered that said matter be and the same is hereby submitted. [12]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,154.

In the Matter of JEW BEN ON, on Habeas Corpus.

(Order Sustaining Demurrer.)

DION R. HOLM, Esq., Attorney for Petitioner.

FRANK M. SILVA, Esq., United States Attorney,
and

BEN F. GEIS, Esq., Assistant United States Attorney, Attorneys for Respondent.

**ON DEMURRER TO PETITION FOR A WRIT
OF HABEAS CORPUS.**

The demurrer to the petition for a writ of habeas corpus herein is sustained and the petition denied.
June 27th, 1921.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 27, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [13]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,154.

In the Matter of the Application of T. C. CHOU for
a Writ of Habeas Corpus for and on Behalf
of JEW BEN ON.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to Honorable FRANK M. SILVA, United States Attorney for the Northern District of California.

You and each of you will please take notice that Jew Ben On, the detained herein, by T. C. Chou, the petitioner herein, hereby appeals to the Circuit Court of Appeals of the United States, for the Ninth Circuit, from the order made and entered herein on the 27th day of June, 1921, by the Honorable Maurice T. Dooling, Judge of the above-entitled court, sustaining the demurrer, discharging the order to show cause and denying the petition for a writ of habeas corpus.

Dated: San Francisco, California, July 7, 1921.

DION R. HOLM,
BERT SCHLESINGER,
SAMUEL C. WRIGHT,

Attorneys for Petitioner and Detained, the Appellants. [14]

[Endorsed]: Receipt of a copy of the within notice of appeal is hereby admitted this 7th day of July, 1921.

FRANK M. SILVA,
U. S. Attorney.

Filed Jul. 7, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 17,154.

In the Matter of the Application of T. C. CHOU
for a Writ of Habeas Corpus for and on
Behalf of JEW BEN ON.

Petition for Appeal.

Comes now Jew Ben On, the detained, by T. C. Chou, the petitioner, who are the appellants herein, and says:

That on the 27th day of June, 1921, the above-entitled court made and entered its order denying the petition for a writ of habeas corpus as prayed for and filed herein, sustained a demurrer to the said petition and discharged an order to show cause why said petition should not be granted. In the said order of Court certain errors were made to the prejudice of the appellants herein, all of which will more fully appear from the assignment of errors filed herein.

WHEREFORE, these appellants pray that an appeal may be granted in their behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit for the correction of the errors complained of, and further, that the transcript of the record, proceedings and papers in the above-entitled case, as shown by the praecipe, may be sent and transmitted to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the rules of said

court in accordance with the law in such case made and provided, that all further proceedings in this matter be stayed until the final determination of said appeal.

Dated: San Francisco, California, July 7, 1921.
[16]

DION R. HOLM,
BERT SCHLESINGER,
SAMUEL C. WRIGHT,

Attorneys for Petitioner and Detained, the Appellants.

[Endorsed]: Receipt of a copy of the within petition for appeal is hereby admitted this 7th day of July 1921.

FRANK M. SILVA,
U. S. Attorney.

Filed Jul. 7, 1921. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [17]

In the Southern Division of the United States
District Court, in and for the Northern Dis-
trict of California, First Division.

No. 17,154.

In the Matter of the Application of T. C. CHOU
for a Writ of Habeas Corpus for and on
Behalf of JEW BEN ON.

Assignment of Errors.

Now comes Jew Ben On, the detained herein, by
T. C. Chou, the petitioner herein, both of whom are

appellants, through their attorneys, Dion R. Holm, Bert Slesinger and Samuel Wright, file the following assignment of errors upon which they will rely in the prosecution of their appeal in the above-entitled case in the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment made by this Honorable Court on the 27th day of June, A. D. 1921.

I.

That the Court erred in denying the petition for a writ of habeas corpus.

II.

That the Court erred in sustaining the demurrer to the petition for a writ of habeas corpus.

III.

That the Court erred in discharging the order to show cause why a writ of habeas corpus should not issue.

IV.

That the Court erred in holding that the Commissioner of Immigration and the Secretary of Labor granted the applicant, Jew Ben On, a fair hearing and that he was not excluded from the United States without due process of law. [18]

V.

That the Court erred in holding that a person of Chinese descent who was in the United States in the year 1880 and prior to the taking effect of the Treaty of 1880 between the United States and China was not entitled to bring to this country members of his family.

VI.

That the Court erred in construing Article II of the Treaty of 1880 between the United States and China and which was ratified on the 5th day of October, A. D. 1881.

VII.

That the Court erred in construing Section 3 of the Act of May 6, 1882, as amended and added to by the Act of July 5, 1884, in failing to find that the father of Jew Ben On was a resident of the United States ninety days next after the passage of the act of May 6, 1882, and as such was entitled to have members of his family admitted to the United States.

WHEREFORE, because of the manifest errors committed by the said Court, the appellants through their attorneys pray that the said judgment sustaining the demurrer to the petition for a writ of habeas corpus, discharging the order to show cause, and denying the writ of habeas corpus be reversed, and for such other and further relief as the Court may deem meet and proper.

Dated: July 7th, 1921.

DION R. HOLM.

BERT SCHLESINGER.

SAMUEL C. WRIGHT. [19]

[Endorsed]: Receipt of a copy of the within assignment of errors is hereby admitted this 7th day of July, 1921.

FRANK M. SILVA,

U. S. Attorney.

Filed Jul. 7, 1921. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [20]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 17,154.

In the Matter of the Application of T. C. CHOU for
a Writ of Habeas Corpus for and on Behalf
of JEW BEN ON.

Order Allowing Appeal.

On motion of Dion R. Holm, one of the attorneys for T. C. Chou, petitioner in the above-entitled cause, and for Jew Ben On, the detained:

IT IS HEREBY ORDERED, that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an order and judgment heretofore made and entered herein sustaining the demurrer to the petition for a writ of habeas corpus, discharging order to show cause and denying petition for a writ of habeas corpus be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in the manner and time prescribed by law, and that meanwhile all further proceedings in this Court and by the immigration authorities be suspended and superseded until the determination of said appeal.

Dated: July 7, 1921.

WM. W. MORROW,
Judge, United States Circuit Court of Appeals,
Ninth Judicial Court. [21]

[Endorsed]: Receipt of a copy of the *within* is hereby admitted this 7th day of July, 1921.

FRANK M. SILVA,
U. S. Atty.,
Attorney for Appellee.

Filed Jul. 7, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [22]

(Citation on Appeal—Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to EDWARD WHITE, Commissioner of Immigration, Port of San Francisco, California, and to FRANK M. SILVA, Esq., U. S. District Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division, First Division, wherein T. C. Chou and Jew Ben On are appellants and you are appellee, to show cause, if any there be, why the

decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, United States District Judge for the Northern District of California, Southern Division, this 6th day of August, A. D. 1921.

FRANK H. RUDKIN,
United States District Judge.

[Endorsed]: Service of the within citation by copy admitted this 6th day of August, 1921.

FRANK M. SILVA,
U. S. District Attorney.

Filed Aug. 6, 1921. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [23]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 17,154.

In the Matter of the Application of T. C. CHOU for
a Writ of Habeas Corpus for and on Behalf
of JEW BEN ON.

**Stipulation and Order Directing Transmission of
Original Exhibits to Appellate Court.**

IT IS HEREBY STIPULATED AND
AGREED by and between the respective parties
in the above-entitled cause that the original records

of the Bureau of Immigration, which were filed in the above-entitled court as exhibits, may be transferred in their original form, and without being transcribed, to the United States Circuit Court of Appeals for the Ninth Circuit, and the same are and may there be considered part of the record in determining this case on appeal to the said United States Circuit Court of Appeals for the Ninth Circuit, without objection on the part of either of said respective parties.

Dated: July 7, 1921.

FRANK M. SILVA,
United States District Attorney.

WILFORD H. TULLY,
Asst. United States Dist. Atty.

DION R. HOLM,
BERT SCHLESINGER,
SAMUEL C. WRIGHT,

Attorneys for Petitioner and Detained, the Appellants. [24]

IT IS HEREBY ORDERED that the terms of the above stipulation be complied with.

WM. W. MORROW,
Judge, United States Circuit Court of Appeals,
Ninth Judicial Court.

[Endorsed]: Filed Jul. 7, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [25]

**Certificate of Clerk U. S. District Court to Transcript
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 25 pages, numbered from 1 to 25, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the matter of Jew Ben On, on Habeas Corpus, No. 17,154, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein), and the instructions of the attorneys for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Eight Dollars and Five Cents (\$8.05), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal issued herein (page 27).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of August, A. D. 1921.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk.

[26]

Citation on Appeal (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to EDWARD WHITE, Commissioner of Immigration, Port of San Francisco, California, and to FRANK M. SILVA, Esq., U. S. District Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States Court for the Northern District of California, Southern Division, First Division, wherein T. C. Chou and Jew Ben On are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, United States District Judge for the Northern District of California, Southern Division, this 6th day of August, A. D. 1921.

FRANK H. RUDKIN,
United States District Judge.

[Endorsed]: No. 17,154. United States District Court for the Northern District of California,

Southern Division. T. C. Chou and Jew Ben On, Appellants, vs. Edward White, Commissioner of Immigration. Citation on Appeal. Filed Aug. 6, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Service of the within citation by copy admitted this 6th day of August, 1921.

FRANK M. SILVA,
U. S. District Attorney. [27]

[Endorsed]: No. 3748. United States Circuit Court of Appeals for the Ninth Circuit. T. C. Chou and Jew Ben On, Appellants, vs. Edward White, as Commissioner of Immigration at the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 9, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

12
No. 3748

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

T. C. CHOU and JEW BEN ON,

Appellants,

VS.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

APPELLANTS' OPENING BRIEF.

DION R. HOLM,

SAMUEL C. WRIGHT,

BERT SCHLESINGER,

Attorneys for Appellants.

FILED

FEB 4 - 1922

F. D. MONOKTON,
CLERK

No. 3748

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. C. CHOU and JEW BEN ON,

Appellants,

VS.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

APPELLANTS' OPENING BRIEF.

Statement of Facts.

Jew Ben On was born in China and applied for admission into the United States before Edward White, United States Commissioner of Immigration at the Port of San Francisco, arriving at said port on the steamship "Tjikembang" November 26, 1920. The applicant claimed admission as the minor son of a lawfully domiciled merchant, to wit, Jew Ngow. The application was made when Jew Ben On was a minor. The matter was referred to a Board of Special Inquiry at Angel Island and on January 25, 1921, Edward White, as Commissioner of Immigra-

tion, denied the applicant permission to land on the sole ground that the mercantile status of Jew Ngow had not been established. The *relationship* between Jew Ben On and Jew Ngow is conceded, and the fact that Jew Ben On is a *minor* is also conceded.

The mercantile status of the father was denied by reason of his having performed certain manual labor not connected with his business.

From the finding of the Commissioner of Immigration an appeal was taken to the Secretary of Labor at Washington, D. C., and on March 18, 1921, the Secretary of Labor affirmed the decision of the Commissioner of Immigration and ordered the appeal of Jew Ben On dismissed and that he be deported to China.

On April 1, 1921, a petition for a writ of habeas corpus was filed in the Southern Division of the United States District Court in and for the Northern District of California in the First Division and thereafter a demurrer to the petition was filed and the matter argued before the court. On June 28, 1921, Judge Dooling sustained the demurrer to the petition, but did not file a written opinion. Thereafter an appeal was perfected to this Honorable Court.

The transcript of all testimony and proceedings had before the Commissioner of Immigration and the Department of Labor from the time Jew Ngow entered the United States are before this court on stipulation between the attorneys for the appellee

and appellants (pages 21-22 Transcript of Record). From these records the facts hereinafter stated are disclosed.

Jew Ngow, the father of the applicant, was born in China in 1868, and was known as Jew Mung and Du Mon. He first came to the United States in the year 1880 and since that time made two trips to China the first being on October 24, 1899, when he left this port as a merchant, returning July 14, 1902. On the second trip Jew Ngow sailed from the Port of San Francisco on October 5, 1909, with the status of a merchant and returned September 22, 1911. In 1899 Jew Ngow was a member of the Mow Lung Company of Merced. In 1909 he was a member of the Quan Yick Lee Company, which was also located in Merced. In 1918 Jew Ngow invested in and was one of the originators of the firm of Emory Chow Company, which company conducts a large general merchandise business in Selma, Fresno County, this state, and which interest he maintains to this date.

On February 10, 1894, at San Francisco, California, Jew Ngow applied for and was given a certificate of residence pursuant to the Act of Congress of May 5, 1892, at which time he proclaimed himself to be a Chinese laborer.

The evidence conclusively shows that Jew Ngow was financially interested in the Emory Chow Company of Selma at the time his son Jew Ben On applied for admission to land at this port, and that the former spent a large portion of his time in the

Emory Chow Company, and when temporarily absent kept in touch with the activities of said company by telephone and otherwise, and advised with the other members of the company as to the policy and conduct of the business affairs of said company.

It is admitted that Jew Ngow did not devote his entire time to the affairs of the Emory Chow Company, for the year prior to the arrival of his son Jew Ben On, and hence in that regard he did not measure up to the requirements of a merchant as defined by the courts and the Department of Labor.

Argument.

There is but one question for this court to determine and that question may be stated as follows:

IS A LABORER OF CHINESE DESCENT, WHO RESIDED IN THE UNITED STATES IN THE YEAR 1880, ENTITLED TO BRING INTO THE UNITED STATES MEMBERS OF HIS FAMILY?

It is our contention that the above question should be answered in the affirmative.

The first treaty between the United States and China concerning the admission of Chinese to this country was not proclaimed until October 5, 1881. The terms of the treaty were concluded on November 17, 1880, ratification was advised by the Senate May 5, 1881, and the treaty was ratified by the Presi-

dent May 9, 1881, and ratifications were exchanged July 19, 1881.

Article II of this treaty provides:

“Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, *and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord*, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the *citizens and subjects of the most favored nation*” .

The first so-called Chinese Exclusion Act was passed May 6, 1882 (22 Stats. S. L. 58).

The sole and undisputed evidence in the case at bar as to when Jew Ngow first came to the United States is found at page 3 Immigration Records Exhibit “C”. When Jew Ngow was having his status investigated prior to his first trip to China and on August 22, 1909, he testified he arrived in the United States in K. S. 6 (1880), which is not denied. At page 34 of the Immigration Record, pertaining to Jew Ben On, the father, on December 14, 1920, again testified in answer to the question

“When did you first come to the United States? A. K. S. 6 (1880)”.

The Chinese Exclusion Act of 1882 as amended in 1884 provides in Section 3 of said Act:

“That the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall

have come into the same before the expiration of ninety days next after the passage of the act to which this act is amendatory. * * *”

From the foregoing it is clear that under Article II of the treaty between the United States and China that Chinese laborers shall be allowed to come and go of their own free will, and under subdivision 3 of the Act of 1884 it will be noted that the terms of the first Chinese Exclusion Act were not intended to apply to Chinese laborers who were in the United States on November 17, 1880, or who arrived in the United States within ninety days after that date.

In the case of Yee Won v. Edward White, No. 15 June 15, 1921, Advance Opinions U. S. Supreme Court, p. 690, a case originally decided in this court, Mr. Justice Reynolds at the commencement of the opinion states that the petitioner was

“a Chinese person first permitted to enter the United States in 1901 as a resident merchant’s minor son, but who subsequently acquired the status of laborer and as such entitled to remain”.

In the instant case Jew Ngow, the father of the applicant, was lawfully in the United States on and prior to November 17, 1880.

The Supreme Court denied Yee Won the right to land, and the following language appears in the concluding paragraph of the opinion:

“This well defined purpose of Congress would be impeded rather than facilitated by permit-

ting entry of the wives and minor children of Chinamen who first came after the ratification of the treaty as members of an exempt class, and later assumed the status of laborers. We think our statutes exclude all Chinese persons belonging to the class defined as laborers except those specifically and definitely exempted and there is no such exemption of a resident laborer's wife and minor children."

From the language of the Supreme Court above italicized it is the contention of appellants that the Supreme Court recognized that a different conclusion would be reached concerning the status of a Chinaman who was a laborer resident of the United States prior to the ratification of the treaty.

On page 9 of the brief for the respondent filed by William L. Frierson, Solicitor General of the United States, in *Yee Won v. White*, supra, which brief, of course, is not binding on this court, the Solicitor General practically conceded, as we contend, that Chinese laborers who were in the United States in the year 1880 have a different status entirely than those who arrived under an exempt status and later acquired the status of laborers, as the following language indicates:

"All the legislation of Congress on this subject has been directed to the exclusion from this country of Chinese laborers. The prohibition against such laborers coming into the country is absolute, with two exceptions. Such laborers in this country at the time the treaty of 1880 was entered into are permitted to leave the country and return, *and indeed, are put in the same class with merchants*". (Italics ours.)

If this court will take the view that Chinese laborers who have arrived here prior to the conclusion of the treaty of 1880 are put in the same class as persons of an exempt status, it must follow in the case at bar that Jew Ben On should be admitted into the United States, and that his father should be accorded the comfort and companionship of his son, which is a natural right, and as the father has chosen the United States as his place of domicile, he should be accorded the further right of bringing members of his family from China to live with him.

The principle just stated has been proclaimed many times by the Supreme Court of the United States, by this court, and by the other federal tribunals. This right to bring members of one's family to the place of domicile of the head of the family has been extended to the wife and children of Chinese merchants and is conclusively acknowledged in the often referred to case of the United States v. Gue Lim, 176 U. S. 459, and then in earlier cases of *In re Tung Yeong*, 19 Fed. 184, *In re Chung Toy Ho*, 42 Fed. 398.

In conclusion we respectfully call the court's attention to the fact that Chinese laborers under Section II of the treaty of 1880 were accorded all the rights, privileges, immunities and exemptions which are accorded to citizens and subjects of the most favored nation. To inhibit a Chinese laborer who was lawfully domiciled in the United States prior to the treaty in question taking effect, from bringing members of his family to this country would not

be according him the rights, privileges, immunities and exemptions enjoyed by other classes of the Chinese race who under our exemption laws are given very limited rights, privileges, immunities and exemptions.

It is therefore respectfully submitted that the court below erred in sustaining the demurrer to the petition and this court should make its order directing that the demurrer be overruled and the writ of habeas corpus issue as prayed for in the petition.

Dated, San Francisco,
February 4, 1922.

Respectfully submitted,

DION R. HOLM,

SAMUEL C. WRIGHT,

BERT SCHLESINGER,

Attorneys for Appellants.

No. 3748

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. C. CHOU and JEW BEN ON,

Appellants,

VS.

EDWARD WHITE, as Commissioner of
Immigration at the Port of San Fran-
cisco,

Appellee.

APPELLEE'S OPENING BRIEF

JOHN T. WILLIAMS,

United States Attorney,

BEN F. GEIS,

Asst. United States Attorney,

Attorneys for Appellee,

FILED

FEB 1 1922

R. D. MONROE

No. 3748

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. C. CHOU and JEW BEN ON,	}
<i>Appellants,</i>	
vs.	
EDWARD WHITE, as Commissioner of Immigration at the Port of San Fran- cisco,	}
<i>Appellee.</i>	

APPELLEE'S OPENING BRIEF

STATEMENT OF FACTS.

Appellant, Jew Ben On, arrived at the Port of San Francisco Ex S. S. Tjikembang on November 26, 1920 (Ex. A, p. 64) and thereupon made application to enter the United States as the minor son of a lawfully domiciled Chinese merchant, to wit, Jew Ngow.

In support of his said application there was filed the affidavit of the alleged father, Jew Gow, alias Jew Lee Kee, bearing the photographs of affiant

and Jew Ben On (Ex. A, p. 3), the affidavit of Emory Chow, bearing affiant's photograph (Ex. A, p. 2) and the affidavit of Jew Ben Heung, bearing affiant's photograph (Ex. A, p. 1).

The application of the said Jew Ben On was denied by a Board of Special Inquiry on the grounds that the mercantile status of the alleged father had not been established to its satisfaction (Ex. A, p. 56). From this decision an appeal was taken to the Secretary of Labor, Washington, D. C., who affirmed the action of said Board and dismissed the appeal (Ex. A, p. 87).

Thereafter, April 1, 1921, a petition for writ of habeas corpus was filed in the United States District Court (T. R. p. 3) and order to show cause issued (T. R. p. 9).

A demurrer was interposed and filed June 25, 1921 (T. R. p. 10) which said demurrer was sustained and petition denied June 27, 1921 (T. R. p. 13).

It is from this order and judgment of the District Court sustaining the demurrer and denying the petition that this appeal is taken.

The memorandum opinion of the Secretary of Labor affirming the action of the Board of Special Inquiry and dismissing the appeal is found at page 87 of the respondent's Ex. A, with marginal notations giving the pages of the exhibits where the testimony referred to therein is found. The fact that Jew

Ben On is a minor and the son of Jew Ngow is conceded.

The Government further concedes that the said Jew Ngow is lawfully resident within the United States, being a Chinese laborer in possession of a certificate of residence issued to him under the name of Du Mon (Ex. D).

It appears from the testimony of Mrs. Agnes H. Merryman (Ex. A, p. 19) and Miss Blanche Baker (Ex. A, p. 16), which testimony is supported by a number of cancelled checks in respondent's Ex. D., that Jew Ngow, under the name of Jew Mung, had been employed as a cook and family servant in the Merryman household for about nine years and was so employed during the entire year prior to the arrival of his son, Jew Ben On, November 26, 1920.

On page 4 of appellant's brief, counsel admits "That Jew Ngow did not devote his entire time to the affairs of the Emory Chow Company for the year prior to the arrival of his son, Jew Ben On."

ARGUMENT

Seven errors were assigned as grounds of appeal to this Court, but counsel for petitioner has evidently abandoned all but one, for he says on page 4 of his brief "There is but one question for this Court to determine and that may be stated as follows: Is a laborer of Chinese descent who resided in the United States in the year 1880 entitled to bring into the United States members of his family."

It is urged by counsel for appellant that Jew Ben On is entitled to admission as the minor son of Jew Ngow by reason of the fact that Jew Ngow, being a lawfully domiciled Chinese laborer, is entitled to bring into the United States his wife and minor children.

It is the Government's contention that appellant, Jew Ben On, is not entitled to admission under the Chinese Exclusion Laws and Treaty because of the fact that his father, Jew Ngow, is a Chinese laborer and, therefore, the minor children partake of the status of the father (at least until they are old enough to acquire an independent status) and are therefore to be classed as laborers in contemplation of law, although they may not be such in fact.

Section 1 of the Act of May 6, 1882, entitled "An Act to Execute Certain Treaty Stipulations Relating to Chinese, Approved May 16, 1882," as amended by the Act of July 5, 1884 (22 Stat. L 58, 23 Stat. L 115), provides in part as follows:

"That from and after the passage of this Act, and until the expiration of 10 years next after the passage of this Act, the coming of Chinese laborers to the United States be, and the same is hereby suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any port or place or having so come to remain within the United States."

This Act was kept in force for various periods of ten years each until the Act of April 29, 1902, as

amended and re-enacted by Sec. 5 of the Deficiency Act of April 27, 1904 (32 Stat. L., part 1, 176, 33 Stat. L., 394-428), was passed. This last mentioned Act, entitled "An act to prohibit the coming into and to regulate the residence within the United States, its territories, and all territory under its jurisdiction, and the District of Columbia, of Chinese and persons of Chinese descent," provides in part as follows:

"Sec. 1. All laws in force on the 29th day of April, 1902, regulating, suspending, or prohibiting the coming of Chinese persons or persons of Chinese descent into the United States, and the residence of such persons therein, including Sec. 5, 6, 7, 8, 9, 10, 11, 13 and 14 of the Act entitled 'An Act to prohibit the coming of Chinese laborers into the United States,' approved Sept. 13, 1888, be, and the same are hereby re-enacted, extended and continued, without modification, limitation or conditions."

Appellant, Jew Ben On, being a laborer in contemplation of law, because of the communicated status of his father, and never having been within the United States, is not entitled to enter as a returning laborer under the provisions of the Act of September 13, 1888, not having the return certificate required by Sec. 7 of said Act. He is not entitled to enter under the provisions of Sec. 1 of the Act of May 6, 1882, as amended by the Act of July 5, 1884, which prohibits the coming of Chinese laborers to the United States, and he cannot enter of his

own right as a person other than a laborer, not having the certificate required by Sec. 6 of said last named Act, showing him to be a teacher, student, merchant or traveler for curiosity or pleasure. It matters not what the financial standing of Jew Ngow may be, or that he himself is entitled to remain, he being a domiciled laborer, with a certificate of residence allowing him to so remain. If he is in fact a laborer, his wife and minor children are not entitled to enter as the wife and minor children of such laborer, nor otherwise than of their own independent status, and then only upon presentation of the certificate required by law.

It was so held in an opinion by Mr. Justice Field in the "Case of the Chinese Wife in re Ah Moy, on Habeas Corpus", decided in the Circuit Court, District of California, September 22, 1884 (21 Fed. 785). In this case the Court says:

"Too Cheong is a Chinese laborer, and resided in the United States, November 17, 1880, and until September, 1883, when he made a visit to China. While there he married a Chinese woman, who, from her appearance in Court, must be a mere child. He returned in September of the present year, bringing his wife with him. Before his departure he obtained from the collector of the port the necessary certificate to enable him to return to the United States. It, however, gave him no authority to bring another person with him. The fiction of the law as to the unity of the two spouses does not apply under the Restriction Act. As a distinct

person she must be regarded, and, therefore, must furnish the certificate required, either by Section 4 or by Section 6 of the Act of 1884."

In the case of *United States vs. Chu Chee et al*, 93 Fed. 797, decided by this Court March 6, 1899, a case in which two Chinese were admitted to the United States claiming to be students, but who did not have the certificate required by Section 6 of the Act of May 6, 1882, as amended by the Act of July 5, 1884, and who were later arrested and ordered deported after a hearing before a United States Commissioner, this Court, speaking through His Honor, Morrow, Circuit Judge, says:

"But not only do the defendants fail to show that their entry into and residence in the United States was lawful, and under a certificate showing that they belonged to a privileged class, but it appears affirmatively that they were at that time the *minor children of a Chinese laborer*, and that they are still minors. *The status of the defendants, under the laws, was that of the father.* The policy of the Exclusion Acts is to prohibit the entry into the United States of this entire class of Chinese laborers as a class. * * * The defendants belonged to that class upon their arrival in this country, and they so continued up to the time of their arrest; and, not having the certificate as required by Section 6 of the Act of May 5, 1892, as amended by the Act of November 3, 1893, they were not entitled to remain in the United States and should have been deported."

Practically the same question was presented to this Court in the case of *Yee Won vs. White*, 258 Fed. 792, in which this Court affirmed the judgment of the District Court denying the writ prayed for. The case was taken to the United States Supreme Court on writ of Certiorari, where the judgment of this Court was affirmed, 41 S. C. 504, 65 L. Ed. 600 (Adv. opinions). As this opinion is short, it is quoted herein in full:

“The courts below denied petitioner’s application for a writ of habeas corpus to secure release of his wife and minor children, who, having been denied admission upon their arrival at San Francisco from China, were being held for return. 258 Fed. 792. He must be regarded here as a Chinese person first permitted to enter the United States in 1901 as a resident merchant’s minor son, but who subsequently acquired the status of laborer and as such entitled to remain.

In respect of the parties specially concerned the Circuit Court of Appeals said: “The father of Yee Won died in San Francisco in 1908. In the latter part of 1910 Yee Won applied to the Immigration officers at the port of San Francisco for an identification of his status. He was about to depart for China and it was his purpose to secure such an identification as would secure his admission upon his return. He made no claim that he was a merchant. His claim was that he was ‘a capitalist and property owner’. He was granted such a certificate and departed for China in January, 1911. He returned on May 29, 1914. He was then 33 years

of age. He claims to have married Chin Shee in China, March 2, 1911, and that a daughter Yee Tuk Oy was born to them November 28, 1912, and a son Yee Yuk Hing was born to them on November 2, 1913. These three are the present applicants to enter the United States. They were all born in China and this is their first application to enter the United States."

The writ was properly denied unless as matter of law such a laborer may properly demand that his wife and minor children be permitted to come into this country and reside with him notwithstanding they were born in China and have never resided elsewhere. In support of such right *United States v. Mrs. Gue Lim*, 176 U. S. 459, is cited, and it is said that the reasoning therein which permitted her to enter because a merchant's wife applies to the family of a Chinese laborer, who lawfully resides here. But that case turned upon the true meaning of Section 6, Act of July 5, 1884 (Ch. 220, 23 Stats. 115), which required every Chinese person other than laborers as condition of admission to present a specified certificate. The conclusion was that the Section should not be construed to exclude their wives, since this would obstruct the plain purpose of the treaty of 1880 to permit merchants freely to come and go.

The treaty of 1894, 28 Stats. 1210, provided that "the coming, except under conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited," but this "shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the

United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement." Exclusion of all Chinese laborers, with certain definite, carefully guarded exceptions, was the manifest end in view, and for a long time the same design has characterized legislation by Congress. "In the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof." See Act of May 6, 1882, 22 Stats. 58; Act of July 5, 1884, 23 Stats. 115; Act of September 13, 1888, 25 Stats. 476, 477; Act of May 5, 1892, 27 Stats. 25; Act of November 3, 1893, 28 Stats. 7.

The special object of the treaty of 1894 was to secure assent of China to the limitation or suspension by the United States of immigration or residence of Chinese laborers. Prior to that time rather drastic legislation had undertaken to limit such immigration and residence. These statutes were "reenacted, extended, and continued, without modification, limitation, or condition" by Act of April 29, 1902 (Ch. 641, 32 Stats. 176) as amended by Act of April 27, 1904 (Ch. 1630, Sec. 5, 33 Stats. 428) and are now in force notwithstanding the treaty of 1894 expired in 1904. *Hong Wing v. United States*, 142 Fed. 128. This well defined purpose of Congress would be impeded rather than facilitated by permitting entry of the wives and minor children of Chinamen who first came after the ratification of the treaty, as members of an exempt class, and later assumed the status of laborers. We think our statutes exclude all

Chinese persons belonging to the class defined as laborers except those specifically and definitely exempted, and there is no such exemption of a resident laborer's wife and minor children.

The judgment of the court below is

Affirmed.

Mr. Justice Clarke dissents.

The only difference between the case at bar and that of Yee Won *supra* is that in the latter case Yee Won entered the United States and became a laborer subsequent to the passage of the Act of 1882, while in the case at bar the ^{applicant} ~~applicant~~, ~~or~~ Jew Ngow, first entered in 1880 and obtained a certificate of residence under the Act of 1893.

The fact nevertheless remains that Jew Ngow is a laborer and that his minor son is to be classed as such and that the Supreme Court in the decision just quoted intended in the closing paragraph thereof to make it plain that our statutes exclude all Chinese persons belonging to the class defined as laborers.

We submit that the record in this case does not disclose any unfairness and that the judgment of the Court below should be affirmed.

Respectfully submitted,

JOHN T. WILLIAMS,

United States Attorney,

BEN F. GEIS,

Assistant United States Attorney,

Attorneys for Appellee.

No. 3748

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. C. CHOU and JEW BEN ON,

Appellants,

VS.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

APPELLANTS' REPLY BRIEF.

DION R. HOLM,

SAMUEL C. WRIGHT,

BERT SCHLESINGER,

Attorneys for Appellants.

FILED

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F. D. MONCKTON,
CLERK

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Appellee.

APPELLANTS' REPLY BRIEF.

The counsel for the appellee admit that Jew Ben On is the minor son of Jew Ngow, and that Jew Ngow is a Chinese laborer lawfully in the United States, and that he *first* entered the United States in 1880, and obtained a certificate of residence under the act of Congress of 1893.

They concede that Jew Ngow was a Chinese laborer lawfully in the United States when the treaty of 1880 between the United States and China was ratified.

Article II of that treaty is as follows:

“Chinese subjects, whether proceeding to the United States as teachers, students merchants, or from curiosity, together with their body and

household servants, and *Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord*, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the *citizens and subjects of the most favored nation.*”

In the case of Ah Moy, on habeas corpus, 21 Fed. Rep.785, cited by counsel for the appellee, Judge Sawyer in the closing paragraph of his concurring opinion in that case said:

“It is greatly to be regretted that every question fairly arising upon the rights of the Chinese under the treaties with China and the restrictions cannot be taken to the supreme court for an authoritative determination. These questions are of the highest international importance, and ought not to be finally adjudged by the local courts of original jurisdiction. * * *”

Counsel for the appellee in discussing the case of United States v. Gue Lim, 176 U. S. 459, cited by appellants, say:

“that case turned upon the true meaning of section 6, act of July 5, 1884, which required every Chinese person other than laborers as a condition of admission to present a specified certificate. The conclusion was that the section should not be construed to exclude their wives, *since this would obstruct the plain purpose of the treaty of 1880 to permit merchants freely to come and go.*”

It will be noted from a reading of article II of the treaty of 1880 that Chinese laborers who were

then in the United States are given the same privilege to go and come of their own free will as merchants; therefore, it follows, that if the exclusion of the wives and families of Chinese merchants is contrary to the plain purpose of the treaty, that equally violative of the treaty would be the exclusion of the families of Chinese laborers who were lawfully in the United States at the time of its ratification.

In the case of the *United States v. Gue Lim*, 176 U. S. 459 (44 L. Ed. 544), the Supreme Court said:

“* * * It is impossible to entertain the belief that the Congress of the United States, immediately after the conclusion of a treaty between this country and the Chinese Empire, would, while assuming to carry out the provisions, pass an act which violated or unreasonably obstructed the obligation of any provision of the treaty. As was stated by Mr. Justice Harlan in *Chew Heong v. United States*, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255: ‘The court should be slow to assume that Congress intended to violate the stipulations of a treaty so recently made with the government of another country. * * * Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings * * * the court cannot be unmindful of the fact that the honor of the government and the people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment,

that these considerations were present in the minds of the members when the legislation in question was enacted.' We ought, therefore, to so consider the act, if it can reasonably be done, as to further the execution, and not to violate the provisions of the treaty. * * * While the literal construction of the section would require a certificate, as therein stated, from every Chinese person, other than a laborer, who should come into the country, yet such a construction leads to what we think an absurd result, for it requires a certificate for a wife of a merchant, among others, in regard to whom it would be impossible to give the particulars which the statute requires shall be stated in such certificate. * * *

There are now comparatively few Chinese laborers in the United States who were here when the treaty of 1880 was ratified. All of those Chinese laborers were required to register, and the Government has an accurate and complete registration of such persons.

It is difficult to conceive how the exclusion of the wives of Chinese merchants obstructs the plain purpose of the treaty of 1880, permitting such merchants to go and come of their own free will, and the exclusion of the wives of Chinese laborers, who were lawfully in the United States when said treaty was ratified, would not have the same effect.

In the case of *United States v. Chu Chee et al.*, 93 Fed. 797, cited by the appellee, the defendants in that case sought to justify their right to remain in this country by assuming the occupation of members of the privileged class. This

court held that the right of said defendants to land in this country was dependent upon their producing to the collector of customs, at the port of their arrival, the certificate required by section 6 of the act of 1882 as amended.

In the case of *Yee Won v. White*, 41 Supreme Court, 65 L. Ed. 600, it will be noted that the petitioner therein named was first permitted to enter the United States in 1901, twenty-one years after the ratification of the treaty of 1880.

In the instant case it is conceded that Jew Ngow was a Chinese laborer lawfully within the United States before the ratification of the treaty of 1880. Under the express provisions of article II of that treaty he is a privileged or exempt person.

It is manifest, we submit, that the closing paragraph of the opinion rendered by Mr. Justice McReynolds in the case of *Yee Won v. White*, *supra*, must be read in the light of the facts of that particular case, and in connection with the context, viz:

“* * * This well defined purpose of Congress would be impeded rather than facilitated by permitting entry of the wives and minor children of *Chinamen* who *first came after* the RATIFICATION of the treaty, as members of an exempt class, and later assumed the status of laborers.”

When so considered it is obvious that the court was referring *not* to the *wives* and *minor children* of Chinese laborers who *first came* to this country *after* the *ratification* of the treaty of 1880, but to the

Chinamen themselves, and therefore the wife and children of the petitioner in that case were not entitled to land.

The Supreme Court did not, as we read the decision in the case of *Yee Won v. White* hold that the wife and minor children of a Chinese laborer who was in this country when the treaty of 1880 was ratified would be denied entry, as this precise question was not involved in that case. The petitioner in that case *first* came to this country in 1901.

It is instructive to note that the Solicitor General of the United States in the brief filed by him in the case of *Yee Won v. United States*, said:

“All the legislation of Congress on this subject has been directed to the exclusion from this country of Chinese laborers.

The prohibition against such laborers coming into this country is absolute, with two exceptions. Such *laborers* in this country at the time the treaty of 1880 was entered into are permitted to leave the country and return, *and, indeed, are put in the same class with merchants.*”

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
March 1, 1922.

DION R. HOLM,
SAMUEL C. WRIGHT,
BERT SCHLESINGER,
Attorneys for Appellants.

1297

No. 3749

United States 16

Circuit Court of Appeals

For the Ninth Circuit.

W. E. GERBER, Jr., and ANGLO-CALIFORNIA TRUST
COMPANY, a Corporation,

Appellants,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUN-
CILL, TIM HARRIGAN, FRANKLIN ADREAN, Jr.,
FRANK GARLOCK, BIRGER JOHANSEN, FRITZ
SHILLING, AXEL JOHNSON, JOHN LAHTIMEN,
WILLIAM H. CRAWFORD, J. B. HUGHES, WAL-
TER S. AUSTIN, LEON A. CARTER, CAMPBELL
A. HOBSON, W. OWENS, W. C. WARD, N. E.
AUSTIN, CHARLES V. SMITH, H. D. WRIGHT,
ROBERT DOUGLE, JOHN LOPEZ, WILLIAM
OVID, S. J. WRIGHT, G. GARFIELD, and D. W.
DAVIS,

Appellees.

Apostles on Appeals.

Upon Appeals from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

FILED

SEP 26 1921

F. D. MONCKTON,
CLERK

United States
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For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSON, JOHN LAHTI-MEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her Engines, Boilers, Tackle, Machinery, Apparel and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corporation,

Claimant.

(Anglo-California Trust Company, a Corporation,
Substituted Claimant.)

THE COMMONWEALTH OF AUSTRALIA and
WILLIAM MORRIS HUGHES, Attorney

General of Said THE COMMONWEALTH
OF AUSTRALIA, for Said THE COM-
MONWEALTH OF AUSTRALIA,

Intervening Libelants.

(W. E. Gerber, Jr.,

Substituted Intervening Libelant.)

Praeipice for Apostles.

To the Clerk of the Above-entitled Court:

Please prepare apostles in the above-entitled cause [1*] consisting of the following:

1. All the matters required either by Section 1 of Rule 4 of the Rules in Admiralty for the United States Circuit Court of Appeals for the Ninth Circuit, or by Rule 49 of the Rules of Practice for the Courts of the United States in Admiralty and Maritime jurisdiction promulgated by the Supreme Court of the United States.

2. The following documents on file herein filed on the respective dates hereinafter set forth:

Libel—April 15, 1921.

Monition—April 17, 1921.

Answer of respondent—April 19, 1921.

Answer of Commonwealth of Australia—April 21, 1921.

Order permitting Commonwealth of Australia to intervene—April 21, 1921.

Libel in intervention of Commonwealth of Australia—April 21, 1921.

Answer to libel of intervening libelant—April 27, 1921.

*Page-number appearing at foot of page of original certified Apostles on Appeal.

Order of reference, etc.—April 27, 1921.

Tender of W. E. Gerber, Jr.—April 28, 1921.

Claim—May 7, 1921.

Reporter's transcript—May 9, 1921.

Substitution of attorneys—May 9, 1921.

Stipulation substituting W. E. Gerber, Jr., for intervening libelants—May 10, 1921.

Substitution of claimant—May 12, 1921.

Opinion—May 14, 1921.

Opinion—May 17, 1921.

Stipulation and order amending name of one libelant—May 21, 1921.

Interlocutory decree—May 25, 1921.

Affidavit of W. S. Austin—May 26, 1921.

Affidavit of F. T. Smith—June 2, 1921. [2]

Affidavit of W. E. Gerber, Jr.—June 2, 1921.

Final Decree—June 2, 1921.

Notice of appeal of Anglo-California Trust Company—June 6, 1921.

Notice of appeal of W. E. Gerber, Jr.—June 6, 1921.

Assignments of error of Anglo-California Trust Company—June 6, 1921.

Assignments of error of W. E. Gerber, Jr.—June 6, 1921.

Stipulation and order regarding original exhibits on appeal—June 7, 1921.

Stipulation and order regarding apostles—June 7, 1921.

Bond on appeal of Anglo-California Trust Company—June 9, 1921.

Bond on appeal of W. E. Gerber, Jr.—June 9, 1921.

Stipulation and order regarding records of other causes introduced in evidence—June —, 1921.

3. The matters required by the stipulation and order last hereinabove mentioned.

4. This praecipe.

PILLSBURY, MADISON & SUTRO,
Proctors for Claimant and Intervening Libelant.

[Endorsed]: Filed Jun. 22, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [3]

In the Southern Division of the District Court of
the United States for the Northern District of
California, First Division.

No. 17,132.

RICHARD J. SPENCER et al.,

Libelants,

vs.

The American Motorship "BENOWA," Her En-
gines, Boilers, Tackle, Machinery, Apparel
and Furniture,

Respondent.

**Statement of Clerk U. S. District Court Case No.
17,132.**

PARTIES.

Original Libelants: Richard J. Spencer, C. V. Mil-
ler, R. H. Councill, Tim Harrigan, Franklin
Adrean, Jr., Frank Garlock, Birger Johansen,
Fritz Shilling, Axel Jonsson, John Lahtimen,
William H. Crawford, J. B. Hughes, Walter S.

Austin, Leon A. Carter, Campbell A. Hobson, W. Owens, W. C. Ward, N. E. Austin, Charles V. Smith, H. D. Wright, Robert Doyle, John Lopez, William Ovid, S. J. Wright, C. Garfield, and D. W. Davis.

Intervening Libelant: The Commonwealth of Australia, and William Morris Hughes, Attorney General of Said The Commonwealth of Australia, for Said The Commonwealth of Australia. [4]

Substituted Intervening Libelant: W. E. Gerber, Jr.
Respondent: The American Motorship "Benowa,"
Her Engines, Boilers, etc.

Claimant: Pacific Motorship Company, a Corporation.

Substituted Claimant: Anglo-California Trust Company, a Corporation.

PROCTORS.

For Original Libelants: IRA S. LILLICK, Esq.,
San Francisco, Cal.

For Intervening Libelant and Claimant: Messrs.
PILLSBURY, MADISON & SUTRO, San
Francisco.

PROCEEDINGS.

1921.

March 15. Filed libel *in rem* for wages.

Issued monition for attachment of Motorship "Benowa," which was returned and filed with the following Return of the U. S. Marshal endorsed thereon:

“In obedience to the within Monition I attached the American ship ‘Benowa’ therein described, on the 16th day of March, 1921, and have given due notice to all persons claiming the same that this Court [5] will, on the 22d day of March, 1921 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein named Motorship ‘Benowa’ and placed a keeper in charge thereof at California City, Cal.

J. B. HOLOHAN,
United States Marshal.
By Frank J. Ralph,
Deputy.

San Francisco, Cal., March 17th,
1921.”

17. Filed monition on return.
 - April 2. Proclamation was this day made.
 19. Filed answer to libel (Pacific Motorship Company).
 21. Filed answer to libel (The Commonwealth of Australia).
- Filed order permitting The Commonwealth of Australia to file libel in intervention.

Filed libel in intervention by the Commonwealth of Australia.

Issued monition upon libel in intervention (monition not filed on return).

27. Filed libelants' answer to libel in intervention.

The Court this day ordered that this cause be referred to Francis Krull, U. S. Commissioner, for the purpose of taking and reporting the testimony, and was then submitted on briefs to be filed.

28. Filed tender by intervening libelant, accompanied by the sum of \$5,609.20, which sum was deposited in the Registry Fund of the court. [6]

- May 5. Filed certificate of U. S. Commissioner relative to certain proceedings had before him.

Filed notice of motion for order directing libelants to produce a certain contract, etc.

6. Filed claim on Pacific Motorship Co. (by Drew Chidester, Receiver) to Motorship "Benowa."
7. It was this day ordered that intervening libelant's motion for order directing libelants to produce contract, etc., be granted in part and denied in part.
9. Filed two volumes of testimony taken before U. S. Commissioner on reference.

Filed substitution of Pillsbury, Madison & Sutro as proctors for respondent in the place of Nathan H. Frank, Esq., and Irving H. Frank, Esq.

Filed order striking out testimony of Spencer, and directing that a subpoena issue directed to J. & R. Wilson, a corporation, commanding them to bring a certain contract.

10. Filed stipulation for substitution of W. E. Gerber, Jr., as intervening libelant in the place and stead of The Commonwealth of Australia, etc.
12. Filed stipulation and order that Anglo-California Trust Company be substituted as claimant herein in the place of Pacific Motorship Company, a corporation.
14. Filed opinion (Hon. Jeremiah Neterer, Judge) in which it was ordered that a decree be entered in favor of libelants, and that the cause be referred to U. S. Commissioner to ascertain the amount due in the event that all parties could not agree on same. [7]
17. Filed supplemental opinion in which it was ordered that a decree be entered in favor of libelants, and that the opinion of the Court filed May 14th, 1921, be expunged from the record.
21. Filed stipulation and order that the name of one of the libelants be cor-

rected to read "S. J. Ryan" instead of "S. J. Wright."

23. Filed objections to proposed form of interlocutory decree, and proposed modifications thereof.
24. Filed acceptance of tender by Wm. H. Crawford and J. B. Hughes, without prejudice to further rights.
25. Filed interlocutory decree.
26. Filed notice of motion for order directing sale of "Benowa."

Filed affidavit of Walter S. Austin in support of motion for sale.

- June
1. Filed objections to proposed form of final decree, and proposed modifications thereof.
 2. Filed two acceptances of tender, without prejudice to further rights, by the following libelants: Leon A. Carter, D. W. Davis, S. J. Ryan, William Ovid, Birger Johanssen, R. H. Council, Tim Harrigan, W. C. Ward, W. Owens, Fritz Shilling, Axel Johnson, H. D. Wright, John Lopez and John Lahtimen.

Filed affidavit of Felix T. Smith, in opposition to motion for sale.

Filed affidavit of W. E. Gerber, Jr., in opposition to motion for sale.

Filed final decree. [8]

4. Filed stipulation and order canceling

bond for costs of The Commonwealth of Australia et al.

6. Filed Notice of appeal (W. E. Gerber, Jr.).

Filed notice of appeal (Anglo-California Trust Co.)

Filed assignment of errors (W. E. Gerber, Jr.).

Filed assignment of errors (Anglo-California Trust Co.).

7. Filed stipulation and order that original exhibits may be transmitted to U. S. Circuit Court of Appeals.

Filed satisfaction of decree (Birger Johansen, John Lahtinen, T. Harri-
gan, H. D. Wright, J. Lopez, Axel
Johnson, Fritz Shilling, Frank Adreon,
W. Owens, W. Ward, S. J. Ryan,
William D. Ovid and C. Garfield).

Filed acceptance of tender by Richard J.
Spencer, Frank Garlock, Walter S.
Austin, Campbell A. Hobson, N. E.
Austin, Franklin Adrean, Jr., and C.
Garfield.

Filed stipulation and order that both
appeals herein may be heard upon one
record.

8. It was this day ordered that the super-
sedeas bond on appeal herein be fixed
in the sum of \$15,000.00.

Filed satisfaction of decree (Leon A.
Carter and Dewey W. Davis).

9. Filed bond on appeal of W. E. Gerber, Jr., in the sum of \$15,000.00 (superseas) and \$250.00 (cost) with the Fidelity and Deposit Company of Maryland as surety.

Filed cost bond on appeal of Anglo-California Trust Co., with Fidelity and Deposit Co. of Maryland as surety.

10. Filed notice of filing bonds on appeal.
11. The motion for sale of vessels was this day dropped from the calendar.
Filed satisfaction of decree (Charles V. Smith). [9]

17. Filed acceptance of tender of (Robert Daigle and Charles V. Smith).

22. Filed praecipe for apostles on appeal.
Filed stipulation and order that portions of records in other causes may be included in the apostles herein.

Filed acceptance of tender by C. V. Miller, subject to conditions named therein.

- July 7. Filed satisfaction of decree (C. A. Hobson, Robert Doyle, and W. H. Crawford).

27. Filed satisfaction of decree (Richard J. Spencer). [10]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, Jr., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JONSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOYLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, C. GARFIELD, and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," her engines, Boilers, Tackle, Machinery, Apparel and Furniture.

Respondent.

Libel (for Seamen's Wages—No. 17,132).

To the Honorable MAURICE T. DOOLING, Judge of the United States District Court for the Northern District of California:

The libel of Richard J. Spencer, C. V. Miller, R. H. Councill, Tim Harrigan, Franklin Adrean, Jr., Frank Garlock, Birger Johansen, Fritz Shilling,

Axel Jonsson, John Lahtinen, William H. Crawford, J. B. Hughes, Walter S. Austin, Leon A. Carter, Campbell A. Hobson, W. Owens, W. C. Ward, N. E. Austin, Charles V. Smith, H. D. Wright, Robert Doyle, John Lopez, William Ovid, S. J. Wright, C. Garfield, and D. W. Davis, officers and members of the crew of the motorship "Benowa," against said motorship "Benowa," her engines, boilers, tackle, machinery, apparel and furniture, and against all [11] persons intervening for their interests therein, in a cause of wages, civil and maritime, alleges as follows:

I.

That on or about the 21st day of January, 1921, they were hired as officers, mariners and seamen at Baltimore, Maryland, on a certain vessel called the motorship "Benowa," now lying in the port of San-Francisco, by one W. C. W. Renny, who assumed to be the master thereof, and the Shipping Articles signed contained, among others, the following terms and conditions, to wit:

"Office of the U. S. Shipping Commisioner for the
for the port of Baltimore, Maryland.

January 21st, 1921.

It is agreed between the master and seamen or mariners of the motorship 'BENOWA,' of which W. C. Renny is at present master now bound from the port of Baltimore, Maryland, to, via one or more coastwise ports, to one or more ports on West Coast of United States, ~~and such other ports and places in any port of the world as the master may direct and back to~~ a final port of discharge in the West Coast

United States for a term of time not exceeding three calendar months. * * * It is also agreed that no overtime to be paid * * * crew to sign clear of ship at final port of discharge. * * * If crew is discharged on West Coast transportation will be paid back to port of Baltimore, Maryland."

II.

That each of the libelants and the master of said vessel signed the said articles and it was provided that each of said libelants should receive wages in accordance with the schedule attached hereto and made a part hereof.

III.

That they all then and there entered on board the said motorship "Benowa," and the said vessel sailed from [12] Baltimore, Maryland, with said libelants on board as the crew thereof, and they continued on board, working as such crew, until they arrived at San Francisco, on or about the 28th day of February, 1921, and have continued on board of the said vessel as the officers and crew thereof, and are now on board said vessel as the crew thereof.

IV.

That during the whole time libelants were in the services of the aforesaid vessel they and each of them faithfully performed their respective duties on board said vessel and each thereof is entitled to receive his wages and transportation to the port of Baltimore, Maryland, and subsistence during their return to said Baltimore, Maryland.

V.

That since their arrival at San Francisco they

have become anxious to return home to said Baltimore, Maryland, where they signed said articles, and are in need of means of support and of means for the purpose of reaching their home port, said Baltimore, Maryland, and are unprovided with necessities for returning to their respective homes.

VI.

That the said vessel is now in the Bay of San Francisco, and is in charge of a keeper under libels now pending against it in the above-entitled court, and the master and owners of said vessel have failed to provide such libelants with the wages due them and the means of returning home and for their support until their arrival home, and they are no longer bound to continue with the said vessel.

VII.

That they are severally entitled to wages from the time of their shipping and sailing in the said vessel, to the [13] date hereof, and also to money sufficient to procure a passage back to Baltimore, and to support in the meantime until they can secure such passage and said passage, including subsistence during time said libelants are traveling on their way home, amounts to the sum of \$209.82 for each libelant.

VIII.

That by reason of the premises libelants are entitled to have, and receive, in addition to said wages, two days' pay per day for each of the days said wages remain unpaid from and after the 15th day of March, 1921.

IX.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelants pray that process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said motor-ship "Benowa," her engines, tackle, apparel, machinery, and furniture and that all persons claiming any right in said vessel may be cited to appear and answer this libel, and all the matters aforesaid, and that the said vessel, her tackle, apparel, machinery, and furniture, may be condemned and sold to pay the amounts due to the libelants, with interest and costs, and that the libelants may have such other and further relief in the premises as in law and justice they are entitled to receive.

Christian J. Miller,	John Lopez,
Wm. Harris Crawford,	Wm. Ovid,
John Burton Hughes,	S. J. Wright,
H. V. Wright,	C. Garfield,
Richard J. Spencer,	D. M. Davis, [14]
R. H. Councill,	John L. Lahtimen,
Tim Harrigan,	Walter S. Austin,
Franklin Adrean, Jr.,	Leon A. Carter,
Frank Garlock,	Campbell Hobson,
Birger Johanson,	W. Owens,
Fritz Shilling,	W. S. Ward,
Axel Jonssen,	N. E. Austin,
Robert Doyle,	Charles V. Smith.

By IRA S. LILLICK,
Their Attorney in Fact.

Subscribed and sworn to before me this 15th day of March, 1921.

CHRISTIAN V. MILLER,
WM. HARRIS CRAWFORD and
JOHN BURTON HUGHES,

[Notary Seal] M. V. COLLINS,

Notary Public in and for the City and County of
San Francisco, State of California.

IRA S. LILLICK,

Proctor for Libelants. [15]

Northern District of California,
United States of America,—ss.

Ira S. Lillick, being first duly sworn, deposes and says: That he is the attorney in fact for Richard J. Spencer, R. H. Councill, Tim Harrigan, Franklin Adrean, Jr., Frank Garlock, Birger Johansen, Fritz Shilling, Axel Jonssen, John Lahtimen, Walter S. Austin, Leon A. Carter, Campbell A. Hobson, W. Owens, W. C. Ward, N. E. Austin, Charles V. Smith, H. D. Wright, Robert Doyle, John Lopez, William Ovid, S. J. Wright, C. Garfield, and D. W. Davis; that he has read the foregoing libel and knows the contents thereof and that the same is true of his own knowledge, save and except as to those matters stated on information or belief, and, as to those matters, he believes it to be true.

IRA S. LILLICK.

Subscribed and sworn to before me this 15th day of March, 1921.

[Notary Seal] M. V. COLLINS,

Notary Public in and for the City and County of
San Francisco, State of California. [16]

Exhibit "A."**SCHEDULE.**

Names.		Wages Due.	Rate of Wages Per Day.
Richard J. Spencer,	1st Off.	\$623.85	\$7.42
Christian V. Miller,	2d Off.	568.10	6.46
Robt. H. Councill,	3d Off.	525.08	5.67
Tim Harrigan,	Bosn.	352.39	3.00
Franklin Adrean, Jr.,	A. B.	333.04	2.83
Frank Garlock,	A. B.	333.04	2.83
Birger Johansson,	A. B.	333.04	2.83
Fritz Shilling,	A. B.	333.04	2.83
John Lahtimen,	A. B.	333.04	2.83
Wm. H. Crawford,	Ch. Eng.	817.80	10.61
John Burton Hughes,	1st Eng.	523.85	7.42
Walter S. Austin,	2d "	568.35	6.46
Leon A. Carter,	3d "	528.08	5.67
Campbell A. Hobson,	Oiler	354.73	3.17
W. Owens,	Oiler	354.73	3.17
W. C. Ward,	Oiler	354.73	3.17
N. E. Austin,	Elec.	430.38	3.83
Charles V. Smith,	Wiper	320.00	2.50
H. D. Wright,	Ch. Std.	306.22	2.50
Robert Doiyle	Ch. Cook	400.15	3.83
John Lopez,	2d Cook	362.05	3.33
William Ovid,	Messman	295.38	2.33
S. J. Ryan,	Messman	307.03	2.33
C. Garfield,	Messman	295.38	2.33
D. W. Davis,	Wireless	442.35	4.17

[Endorsed]: Filed Mar. 15, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [17]

(Monition—No. 17,132.)

Northern District of California,—ss.

The President of the United States of America, to
the Marshal of the United States for
[Seal] the Northern District of California,
GREETING:

(Issued under Prov. Act July 1, 1918.)

WHEREAS, a libel hath been filed in the Southern Division of the United States District Court for the Northern District of California, First Division, on the 15th day of March, in the year of our Lord one thousand nine hundred and twenty-one, by Richard J. Spencer, et al., libelants, against the Am. motorship "Benowa," her tackle, apparel and furniture, in a cause of Libel seaman wages \$10,395.83, civil and maritime, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said vessel, her tackle, etc., may for the causes in the said libel mentioned be condemned and sold to pay the demands of the libelant,—

YOU ARE THEREFORE HEREBY COM-
MANDED to attach the said vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same and to give due notice to all persons claiming the same, or

knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, [18] that they be and appear before the said Court, to be held in and for the Northern District of California, on the 22d day of March, A. D. 1921, at 10 o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf.

And what you shall have done in the premises do you then and there make return thereof, together with this writ.

WITNESS the Hon. MAURICE T. DOOLING, Judge of said Court, at the city and county of San Francisco, in the Northern District of California, this 15th day of March, in the year of our Lord one thousand nine hundred and twenty-one.

WALTER B. MALING,

Clerk,

By C. W. Calbreath,

Deputy Clerk.

IRA S. LILLICK,

Proctor for Libelant. [19]

[Endorsed]:

Marshal's Return to Monition.

In obedience to the within monition, I attached the American ship "Benowa" therein described, on the 16th day of March, 1921, and have given due notice to all persons claiming the same that this Court will, on the 22d day of March, 1921 (if that day be a day of jurisdiction, if not, on the next day

of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein named motorship "Benowa" and placed a keeper in charge thereof, at California City, Cal.

J. B. HALOHAN,
United States Marshal.
By FRANK J. RALPH,
Deputy.

San Francisco, Cal., March 17th, 1921.

Filed Mar. 17, 1921. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [20]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WIL-

LIAM OVID, S. J. WRIGHT, C. GARFIELD and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," her engines, boilers, tackle, machinery, apparel and furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corporation.

Claimant.

Answer of Respondent Pacific Motorship Company to Libel.

To the Hon. MAURICE T. DOOLING, Judge of the United States District Court, Southern Division, in and for the Northern District of California, Division One.

The answer of Pacific Motorship Company, corporation, to the libel of Richard J. Spencer, et al, against the American Motorship "Benowa," her engines, boilers, tackle, machinery, apparel and furniture, in a cause of contract, civil and maritime, alleges:

I.

Answering unto said libel, and particularly unto article II therein, respondent denies that each or any of said [21] libelants should received wages in accordance with the schedule attached to said libel.

II.

Answering unto article III of said libel, this claim-

ant denies that said libelants, or either or any of them, have continued on board said vessel as the officers and crew thereof after the said — day of March, 1921, and further denies that at the time of the filing of said libel they were, or now are, on board said vessel as the crew thereof.

III.

Answering unto article IV of said libel this claimant denies that each, or any, of said libelants are entitled to sustenance during their return to said Baltimore, Maryland.

IV.

Answering unto article VII of said libel, this claimant denies that said libelants are severally, or otherwise, or at all, entitled to wages from the day of shipping and sailing of said vessel to the date of said libel, and further denies that they are entitled to support in the meantime until they secure such passage, or during the time said libelants are traveling on their way home, and claimant further denies that said passage money amounts to \$209.82 for each of said libelants.

V.

Answering unto article VIII of said libel, this claimant denies that by reason of the premises, or otherwise, or at all, the libelants, or each or any of them, are entitled to receive in addition to said wages, two days' pay per day for each of said days said wages remain unpaid from and after the 15th day of March, 1921, or otherwise, or at all, [22] entitled to two days' pay per day for each of the days said wages remain unpaid.

VI.

Answering unto article IX of said libel, this claimant denies that all or singular the premises in said libel set forth are true, but admits that the same are within the maritime and admiralty jurisdiction of the United States and of this Honorable Court.

Further answering unto said libel, this claimant alleges, that on the 8th day of March, 1921, a complaint was filed in this court, Division Two, in Equity, asking for the appointment of a receiver, among other vessels, of the motorship "Benowa," and that thereafter such proceedings were had in said matter that on the 26th day of March, 1921, an order was duly made, granting said petition for receiver, and appointing Drew Chidester, receiver therein, and that thereafter, to wit, on the 28th day of March, 1921, said receiver duly qualified, and took into his possession the said motorship "Benowa" subject to the possession of the United States Marshal and to the further order of said Court with respect thereto.

That said receiver has at no time had any funds from which to pay the said libelants, or any or either of them. That it is the purpose of said receiver to ask said Court for the discharge of said vessel from the custody of said marshal, and that the same be placed in the custody of said receiver, and that the claims of said libelants, after having been adjudicated as to their amounts, shall be transferred to the proceeding in equity, so that the same may be duly administered and marshaled by the said court and paid [23] out of the proceeds which shall come

into the possession of said receiver under said receivership.

That at no time since the filing of said libel has there been any money from which the said wages could be paid, and that there has been no refusal or neglect on the part of the master or owners to make payment in the manner prescribed by Sec. 4529 of the United States Revised Statutes, but the same has not been paid because of and for the reason hereinbefore set forth, and not otherwise.

WHEREFORE, claimant prays that said libel may be dismissed, and for its costs herein.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Claimant. [24]

State of California,
City and County of San Francisco,—ss.

Drew Chidester, being duly sworn, deposes and says: That he is the receiver of the motorship “Benowa,” under the order of the above-entitled court in the suit of The Commonwealth of Australia, et al., vs. Pacific Motorship Company, et al., No. 595, in Equity, in the above-entitled court, and as such is the agent of the owner of said motorship “Benowa” for the purpose of verifying this answer. That he has read the foregoing answer to libel, and knows the contents thereof; that the same is true as he verily believes.

DREW CHIDESTER.

Subscribed and sworn to before me this 14th day of April, 1921.

[Notary Seal] JAMES MASON,
Notary Public in and for said City and County of
San Francisco, State of California. [25]

[Endorsed]: Receipt of a copy of the within answer is hereby admitted this 11th day of April, 1921.

IRA S. LILLICK,
Proctor for Libelant.

Filed Apr. 19, 1921. W. B. Maling, Clerk, By
C. W. Calbreath, Deputy Clerk. [26]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLICK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JONSSON, JOHN H. LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. G. WRIGHT, C. GARFIELD and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her Engines, Boilers, Tackle, Machinery, Apparel and Furniture,

Respondent.

Answer of the Commonwealth of Australia and of William Morris Hughes, Attorney General of the Said the Commonwealth of Australia, for Said the Commonwealth of Australia.

To the Honorable M. T. DOOLING, Judge of the Above-entitled Court:

The answer of The Commonwealth of Australia, and of William Morris Hughes, Attorney General of the said The Commonwealth of Australia, for said The Commonwealth of Australia, intervening for its interests herein to the libel of the above-named libelants, admits, denies and alleges as follows:

I.

Alleges that it is without information or belief as to the allegations of Article I of said libel, wherefore it calls for strict proof thereof. [27]

II.

Alleges that it is without information or belief as to the allegations of article II of said libel, wherefore it calls for strict proof thereof.

III.

Alleges that it is without information or belief as to the allegations of article III of said libel, wherefore it calls for strict proof thereof.

IV.

Alleges that it is without information or belief as

to the allegations of article IV of said libel, wherefore it calls for strict proof thereof.

V.

Alleges that it is without information or belief as to the allegations of article V of said libel, wherefore it calls for strict proof thereof.

VI.

Answering unto the allegations of article VI of said libel, admits that the vessel therein referred to is now in the Bay of San Francisco, in charge of a keeper, under libels now pending against it in the above-entitled court. Alleges that it is without information or belief as to the remaining allegations of said article, wherefore it calls for strict proof thereof.

VII.

Alleges that it is without information or belief as to the allegations of article VII of said libel, wherefore it calls for strict proof thereof.

VIII.

Denies that by reason of the premises therein or at all set forth in said libel, libelants are, or any of them [28] is, entitled to receive, in addition to said or any wages, two days' wages for each or any of the days said wages remain unpaid, from and after the fifteenth day of March, 1921.

IX.

Answering unto the allegations of article IX of said libel, denies that all and singular the premises therein set forth are true.

Further answering unto said libel, this intervening respondent alleges that it has an equitable lien upon the American motorship "Benowa," referred to in said libel, and certain other property, as security for the payment of the sum of one million six hundred twenty-five thousand (1,625,000) dollars, being the sum agreed to be paid by the Pacific Freighters Company and the Pacific Motorship Company for the release of certain mortgages owned and held by this intervening respondent on said American motorship "Benowa," and for other property. A libel in intervention has been filed in this court in the above-entitled matter, and it is hereby referred to for further particulars.

WHEREFORE said respondents prays that the above-entitled court fix the rights of the several libelants and claimants to said vessel, and that this Court may thereafter make such decree as may be just and right in the premises.

EDW'D J. McCUTCHEN,
J. M. MANNON, JR.,
McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for said Intervening Respondent. [29]

State and Northern District of California,
City and County of San Francisco,—ss.

J. M. Mannon, Jr., being first duly sworn, deposes and says: That he is a member of the firm of McCutchen, Willard, Mannon & Greene, attorneys for the intervening libelant in the within entitled cause; that affiant and said firm have their offices in the City and County of San Francisco, in said State.

That intervening libelant is a self-governing colony of the United Kingdom of Great Britain and Ireland; that all of its officers are nonresidents of the State of California, and are all outside of the State of California, and that no one of the officers of said intervening libelant is within the State of California, the place where affiant and the said firm of McCutchen, Willard, Mannon & Greene have his or their offices; that affiant makes this verification on behalf of said intervening libelant by reason of the facts hereinabove set forth; that affiant had obtained knowledge of the facts set forth in said answer from correspondence with said intervening libelant and interviews with its lawful representative; that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

J. H. MANNON, Jr.

Subscribed and sworn to before me this 20th day of April, 1921.

[Notary Seal] FRANK L. OWEN,
Notary Public in and for the City and County of
San Francisco, State of California. [30]

[Endorsed]: Service of the within answer and receipt of a copy is hereby admitted this 20th day of April, 1921.

IRA S. LILLICK,
Proctor for Libelants.

Receipt of copy admitted.

NATHAN H. FRANK,
IRVING H. FRANK,
(Initialed) I. H. F.,
Proctors for Receiver.

Filed Apr. 21, 1921. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [31]

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. B. MILLER, R. H.
COUNCILL, TIM HARRIGAN, FRANK-
LIN ADREAN, Jr., FRANK GARLOCK,
BIRGER JOHANSEN, FRITZ SHIL-
LING, AXEL JONSSON,, JOHN H.
LAHTIMEN, WILLIAM H. CRAWFORD,
J. B. HUGHES, WALTER S. AUSTIN,
LEON A. CARTER, CAMPBELL A. HOB-
SON, W. OWENS, W. C. WARD, N. E.
AUSTIN, CHARLES V. SMITH, H. D.
WRIGHT, ROBERT DOUGLE, JOHN
LOPEZ, WILLIAM OVID, S. G. WRIGHT,
C. GARFIELD and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her En-
gines, Boilers, Tackle, Machinery, Apparel
and Furniture,

Respondent.

THE COMMONWEALTH OF AUSTRALIA, and
WILLIAM MORRIS HUGHES, Attor-
ney General of Said THE COMMON-
WEALTH OF AUSTRALIA, for Said THE
COMMONWEALTH OF AUSTRALIA,
Intervening Libelant.

**Order Permitting Libel in Intervention of Common-
wealth of Australia.**

The Commonwealth of Australia, and William Morris Hughes, Attorney General of said The Commonwealth of Australia, for said The Commonwealth of Australia, having applied for permission to file a libel in intervention, and all parties consenting thereto,—

IT IS HEREBY ORDERED that The Commonwealth of Australia and William Morris Hughes, Attorney General of said The Commonwealth of Australia, for said The Commonwealth of Australia, be, and it is hereby granted leave to file a libel [32] in intervention in the above-entitled matter.

Dated, San Francisco, California, April 18th, 1921.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Apr. 21, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [33]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. B. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, Jr., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JONSSON, JOHN H. AHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. G. WRIGHT, C. GARFIELD and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her Engines, Boilers, Tackle, Machinery, Apparel and Furniture,

Respondent.

THE COMMONWEALTH OF AUSTRALIA, and WILLIAM MORRIS HUGHES, Attorney General of the Said THE COMMONWEALTH OF AUSTRALIA, for Said THE COMMONWEALTH OF AUSTRALIA,

Intervening Libellant.

Libel in Intervention (of the Commonwealth of Australia).

To the Honorable M. T. DOOLING, Judge of said Court:

The libel in intervention of The Commonwealth of Australia, and William Morris Hughes, Attorney General of said The Commonwealth of Australia, for said The Commonwealth of Australia, intervening libelant, against said motorship "Benowa," her engines, boilers, tackle, machinery, apparel and furniture, and against all persons intervening for their interest therein, in a cause of contract, civil and maritime, [34] alleges as follows:

I.

That libelant, The Commonwealth of Australia, is and at all the times herein mentioned was a self-governing colony of the United Kingdom of Great Britain and Ireland.

That the above-named William Morris Hughes is the duly qualified and acting Attorney General of said The Commonwealth of Australia.

That under and by virtue of the laws of said United Kingdom of Great Britain and Ireland and of said The Commonwealth of Australia, said The Commonwealth of Australia is entitled to sue for the enforcement of any rights of action existing in its favor in any court in the name of said Commonwealth, or such suit, action or proceeding may be brought and prosecuted in the name of said Commonwealth by its Attorney General or by and in the name of its Attorney General for and in behalf of said Commonwealth.

That wherever the term "libelant" is used hereinafter in this libel in intervention, the said term is so used to refer to the aforesaid Commonwealth of Australia.

II.

That said American motorship "Benowa" is now within the port of San Francisco, within the jurisdiction of the United States and this Honorable Court.

III.

That on and prior to September 2, 1919, the libelant was the owner of the motorship "Benowa"; that on or about the second day of September, 1919, libelant sold and transferred to one J. E. Chilberg said motorship "Benowa" at an agreed [35] price of \$430,000. That on said last-mentioned date said J. E. Chilberg paid to libelant on account of the purchase price of said motorship "Benowa" the sum of \$86,000 and made and executed to this libelant notes for the balance of the purchase price of said vessel, and at the same time made, executed and delivered to this intervening libelant a mortgage upon said motorship "Benowa" securing the payment of said notes.

IV.

That thereafter and prior to the 21st day of October, 1920, Pacific Motorship Company succeeded to all the right, title and interest of said Chilberg in and to said motorship "Benowa," subject, however, to the lien of said mortgage given upon said vessel by said Chilberg, as hereinbefore

set forth, and said Pacific Motorship Company did at said time assume the payment of said notes secured by said mortgage, according to their tenor and agreed in writing to pay the same.

V.

That on or about the 21st day of October, 1920, at the City and County of San Francisco, State of California, intervening libelant, as party of the first part, and Pacific Motorship Company, a corporation, and Pacific Freighters Company, a corporation, as parties of the second part, made and entered into an agreement in writing, pursuant to which, intervening libelant agreed to release its said mortgage lien upon said motorship "Benowa." That in and by said last mentioned agreement, said Pacific Motorship Company and said Pacific Freighters Company agreed to make payment of certain sums, as therein provided, and further agreed to make payment of certain sums, as therein provided, and further agreed to form a corporation under the laws of the State of California, and to transfer or cause to be transferred to said corporation the [36] said motorship "Benowa" and certain other motorships and other property, and also agreed that said new corporation therein agreed to be formed, should thereupon, in the manner provided by law, create a bond issue of two thousand (2,000) gold bonds, having a part value of One Thousand (\$1,000) Dollars each, dated January 1, 1921, said bonds to be payable as to principal as specifically provided in said agreement, and said bonds to bear interest at the rate of seven per cent

per annum, payable semi-annually, and said entire issue of bonds to be secured by a mortgage or deed of trust to be made, executed and delivered by said new corporation to the Anglo California Trust Company, a corporation, as trustee, upon the terms and in the manner particularly and specifically set forth in said agreement, and in and by said agreement it was further agreed that one thousand six hundred and twenty-five (1,625) of said bonds should thereupon be delivered to this intervening libelant in payment of the purchase price of certain vessels therein set forth and of the satisfaction of the mortgage lien on said motorship "Benowa" and other vessels therein described, and said bonds were to be so delivered to this intervening libelant in exchange for releases of said mortgage on said motorship "Benowa" and certain other vessels therein set forth.

VI.

That intervening libelant is and ever since prior to the 15th day of January, 1921, has been ready, able and willing to make, execute and deliver to said new corporation releases of the existing mortgages upon said motorship "Benowa" and other vessels, in the manner and form provided in said agreement and to do all other things and acts on its part required to be done, pursuant to said agreement, in order [37] to entitled it to receive delivery of said one thousand six hundred and twenty-five (1,625) bonds hereinbefore described. That said Pacific Motorship Company and Pacific Freighters Company, and others of the said parties, and each

of them, have continuously and wrongfully declined and refused, and still decline and refuse to deliver, or cause to be delivered to said intervening libelant, said on thousand six hundred and twenty-five (1,625) bonds, or any of them, or to proceed with the incorporation of said new corporation, as provided in said agreement, or to do any of the other things required of them by said agreement.

VII.

That by reason of the foregoing facts, intervening libelant is entitled to an equitable lien upon said motorship "Benowa," and certain other property, as security for the payment of the sum of one million, six hundred twenty-five thousand (1,625,000) dollars, together with interest thereon as in said agreement provided.

VIII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE intervening libelant prays that it be decreed that it has an equitable lien on said motorship "Benowa" and that the rights of the several libelants and claimants to said vessel be fixed, and that this Court may thereafter make such decree as may be just and right in the premises.

EDW'D J. McCUTCHEN,

J. M. MANNON, Jr.,

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for said Intervening Libelant. [38]

State and Northern District of California,
City and County of San Francisco,—ss.

J. M. Mannon, Jr., being first duly sworn, deposes and says: That he is a member of the firm of McCutchen, Willard, Mannon & Greene, attorneys for the intervening libelant in the within entitled cause; that affiant and said firm have their offices in the City and County of San Francisco, in said State.

That intervening libelant is a self-governing colony of the United Kingdom of Great Britain and Ireland; that all of its officers are nonresidents of the State of California, and are all outside of the State of California, and that no one of the officers of said intervening libelant is within the State of California, the place where affiant and the said firm of McCutchen, Willard, Mannon & Greene have his and their officers; that affiant makes this verification on behalf of said intervening libelant by reason of the facts hereinabove set forth; that affiant has obtained knowledge of the facts set forth in said libel in intervention from correspondence with said intervening libelant and interviews with its lawful representative; that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

J. M. MANNON, Jr.

Subscribed and sworn to before me this 20th day of April, 1921.

[Notary Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of
San Francisco, State of California. [39]

[Endorsed]: Service of the within libel in intervention and receipt of a copy is hereby admitted this 20th day of April, 1921.

IRA S. LILLICK,
Proctor for Libelants.

Receipt of copy admitted.

NATHAN H. FRANK,
IRVING H. FRANK,
(Initialed) IHF.,
Proctors for Receiver.

Filed Apr. 21, 1921. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [40]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. B. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, Jr., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JONSSON, JOHN H. AHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN

LOPEZ, WILLIAM OVID, S. G. WRIGHT,
C. GARFIELD and D. W. DAVIS,
Libelants,

vs.

The American Motorship "BENOWA," Her En-
gines, Boilers, Tackle, Machinery, Apparel
and Furniture,

Respondent.

THE COMMONWEALTH OF AUSTRALIA, and
WILLIAM MORRIS HUGHES, Attorney
General of the Said THE COMMON-
WEALTH OF AUSTRALIA, for Said THE
COMMONWEALTH OF AUSTRALIA,
Intervening Libelant.

**Answer to Libel in Intervention (of the Common-
wealth of Australia.)**

To the Honorable MAURICE T. DOOLING, Judge
of the Above-entitled Court:

The answer of Richard J, Spencer et al., libelants
above named, to the libel in intervention of The
Commonwealth of Australia and William Morris
Hughes, Attorney General of said The Common-
wealth of Australia, for said The Commonwealth
of Australia, admits, denies and alleges as follows:

I.

Alleges that they are without information or be-
lief as to the allegations of articles I, III, IV, V
and VI. [41]

II.

Answering unto paragraph VII of said libel,
libelants allege that they have no information or be-

lief to enable them to state whether or not libelant in intervention is entitled to an equity lien on said motorship "Benowa" and certain other property as security for the sum of \$1,625,000, together with interest thereon, as alleged therein, but, in this behalf, said libelants allege that if the intervening libelant has an equitable lien or otherwise, it is subsequent to the lien of the libelants herein on said motorship "Benowa."

WHEREFORE said libelants pray that the intervening libelant take nothing by its alleged cause of libel and that said libelants have judgment for their costs, together with such other relief as may be meet and equitable in the premises.

Richard J. Spencer,	Leon A. Carter,
C. V. Miller,	Campbell A. Hobson,
R. H. Councill,	W. Owens,
Tim Harrigan,	W. C. Ward,
Franklin Adrean, Jr.,	N. E. Austin,
Frank Garlock,	Charles V. Smith,
Birger Johansen,	H. D. Wright,
Fritz Shilling,	Robert Dougle,
Axel Jonsson,	John Lopez,
John H. Ahtimen,	William Ovid,
William H. Crawford,	S. G. Wright,
J. B. Hughes,	C. Garfield and
Walter S. Austin,	D. W. Davis,

Libelants.

By R. J. SPENCER,

IRA S. LILLICK,

Proctor for Libelants. [42]

United States of America,
Northern District of California,—ss.

R. J. Spencer, being first duly sworn, deposes and says: That he is one of the libelants herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information or belief, and that, as to those matters, he believes it to be true.

R. J. SPENCER.

Subscribed and sworn to before me this 27th day of April, 1921.

[Notary Seal]

E. M. CLARK,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Apr. 27, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [43]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Wednesday, the twenty-seventh day of April, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable, JEREMIAH NETERER, Judge.

No. 17,132.

RICHARD J. SPENCER et al.

vs.

Am. Motorship "BENOWA," etc.

(Order of Reference to Take Testimony.)

This cause came on regularly this day for hearing of issues and, after hearing A. J. Olson, I. H. Frank, T. A. Thatcher and F. Smith, Esqs., proctors herein, the Court ordered that this cause be, and the same is hereby referred to United States Commissioner Francis Krull for the taking, forthwith, of testimony, or stipulation of the facts in the cause, and that said commissioner report the same. Further ordered that said matter be, and the same is hereby submitted on briefs to be filed in two *and two* days. [44]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, Jr., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSON, JOHN LAHTI-MEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN,

CHARLES V. SMITH, H. D. WRIGHT,
ROBERT DOUGLE, JOHN LOPEZ,
WILLIAM OVID, S. J. WRIGHT, C.
GARFIELD and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her En-
gines, Boilers, Tackle, Machinery, Apparel
and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corpora-
tion,

Claimant.

Tender.

Now comes William E. Gerber, Jr., and hereby offers to pay to libelants herein the sum of fifty-six hundred and nine and 20/100 dollars (\$5609.20), being wages due to libelants in accordance with the shipping articles mentioned in the libel herein, up to and including the 17th day of March, 1921, which said sum is hereby deposited with the clerk of this court.

Said William E. Gerber, Jr., likewise offers to pay to libelants their costs heretofore incurred herein.

Said William E. Gerber, Jr., likewise offers to [45] furnish to such of libelants as may desire the same, transportation in accordance with said shipping articles.

Dated: April 27, 1921.

PILLSBURY, MADISON & SUTRO,
Attorneys for William E. Gerber, Jr.

[Endorsed]: Receipt of a copy of the within is admitted this 27th day of April, 1921, at 4:27 P. M.

IRA S. LILLICK,
Proctor for Libelants.

Filed Apr. 28, 1921. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [46]

In the Southern Division of the United States
District Court for the Northern District of
California.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER et al.,

Libelants,

vs.

The American Motorship "BENOWA," etc.

(Claim.)

To the Honorable Judges of the District Court of
the United States for the Northern District of
California.

The claim of Pacific Motorship Company, a corporation, by Drew Chidester, receiver, to the American motorship "Benowa," her tackle, apparel and furniture, now in the custody of the marshal of the United States for the said Northern District of California, at the suit of Richard J. Spencer et al. vs. The American Motorship "Benowa," alleges:

That Pacific Motorship Company, a corporation, is the true and *bona fide* owner of said American motorship "Benowa," her tackle, apparel and

furniture, and that no other person is owner thereof; and that Drew Chidester is in possession of said vessel under an order of the court above named, made in the Second Division thereof, as receiver of said vessel and said Pacific Motorship Company.

WHEREFORE, this claimant prays that this Honorable Court will be pleased to decree a restitution of the said vessel to the said receiver, and otherwise right and justice to administer in the premises.

PACIFIC MOTORSHIP CO.,

By DREW CHIDESTER,

Receiver. [47]

Northern District of California,—ss.

Subscribed and sworn to before me this 5th day of May, A. D. 1921.

[Seal]

MURIEL ATHERTON RUSSELL,

Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires January 9, 1924.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Claimant.

[Endorsed]: Filed May 6, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [48]

In the Southern Division of the United States
District Court for the Northern District of
California, Division One.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER et al.,

Libelants,

vs.

The American Motorship "BENOWA," Her En-
gines, Boilers, etc.,

Respondent.

THE COMMONWEALTH OF AUSTRALIA, and
WILLIAM MORRIS HUGHES, Attorney
General of Said THE COMMONWEALTH
OF AUSTRALIA, etc.,

Intervening Libellant.

Substitution of Proctors.

The Court above named, Division Two thereof, having ordered the receiver to release the respondent vessel herein, and the action in which said receiver appointed having been dismissed, we, the undersigned proctors for said receiver, hereby substitute Messrs. Pillsbury, Madison & Sutro as proctors for the respondent herein, in our place and stead.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Respondent.

We hereby accept the substitution of ourselves as proctors for the respondent herein, in the place

and stead of Messrs. Nathan H. Frank and Irving H. Frank.

PILLSBURG, MADISON & SUTRO.

Dated: May, 1921.

[Endorsed]: Filed May 9, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [49]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H.
COUNCILL, TIM HARRIGAN, FRANK-
LIN ADREAN, Jr., FRANK GARLOCK,
BIRGER JOHANSEN, FRITZ SHIL-
LING, AXEL JONSSON, JOHN H.
AHTIMEN, WILLIAM H. CRAWFORD,
J. B. HUGHES, WALTER S. AUSTIN,
LEON A. CARTER, CAMPBELL A. HOB-
SON, W. OWENS, W. C. WARD, N. E.
AUSTIN, CHARLES V. SMITH, H. D.
WRIGHT, ROBERT DOUGLE, JOHN
LOPEZ, WILLIAM OVID, S. G. WRIGHT,
C. GARFIELD and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her En-
gines, Boilers, Tackle, Machinery, Apparel
and Furniture,

Respondent.

**THE COMMONWEALTH OF AUSTRALIA, and
WILLIAM MORRIS HUGHES, Attorney
General of Said THE COMMONWEALTH
OF AUSTRALIA, for Said THE COM-
MONWEALTH OF AUSTRALIA,**

Intervening Libelant.

Stipulation for Substitution of Intervening Libelant.

W. E. Gerber, Jr., having purchased all the rights of the above-named intervening libelant in the above-named motorship "Benowa," and all the rights of said intervening libelant under the contract dated October 21, 1920, mentioned in the libel in intervention herein,—

IT IS HEREBY STIPULATED that said W. E. Gerber, Jr., be, and he is hereby, substituted as intervening libelant in [50] the above-entitled cause.

Dated May 9, 1921.

EDW'D J. McCUTCHEN,

J. M. MANNON, Jr.,

McCUTCHEN, WILLARD, MANNON &
GREENE,

Proctors for Intervening Libelant, The Commonwealth of Australia, and William Morris Hughes, Attorney General of Said The Commonwealth of Australia, for Said The Commonwealth of Australia.

PILLSBURY, MADISON & SUTRO,

Proctors for W. E. Gerber, Jr.

I consent to the foregoing substitution.

IRA S. LILLICK,

Proctor for Libelant.

It is so ordered.

District Judge.

[Endorsed]: Filed May 10, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [51]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER et al.,

Libelants,

vs.

The American Motorship "BENOWA," Her En-
gines, etc.,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corpora-
tion,

Claimant.

Substitution of Claimant.

The court above named, Division Two thereof, having ordered the receiver to release the respondent vessel herein, and the action in which said receiver was appointed having been dismissed, and the undersigned, Messrs. Pillsbury, Madison & Sutro, having been substituted as proctors for the respondent herein,—

It is hereby STIPULATED that Anglo-California Trust Company be substituted as claimant herein.

Dated: San Francisco, May 11th, 1921.

IRA S. LILLICK,

Proctor for Libelants.

PILLSBURY, MADISON & SUTRO,

Proctors for Respondent and Claimant.

So ordered.

WM. C. VAN FLEET,

District Judge. [52]

[Endorsed]: Filed May 12, 1921. Walter B. Maling, Clerk. [53]

In the Southern Division of the United States
District Court, in and for the Northern District
of California, First Division.

IN ADMIRALTY.

Before Hon. FRANCIS KRULL, U. S. Commis-
sioner.

RICHARD J. SPENCER et al.,

Libelants,

vs.

American Motorship "BENOWA," Her Engines,
Boilers, Tackle, Machinery, Apparel and
Furniture,

Respondent.

Testimony Taken on Reference.

Friday, April 29, 1921.

COUNSEL APPEARING:

For the Libelants: IRA S. LILLICK, Esq., and
ARTHUR OLSON, Esq.

For the Receiver: IRVING H. FRANK, Esq.

For William E. Gerber: FELIX SMITH, Esq.

The COMMISSIONER.—Let it appear that this matter was noticed for hearing this morning, and we are now ready to proceed. Mr. Olson, have you given notice to all the counsel for the respective parties?

Mr. OLSON.—Yes.

The COMMISSIONER.—And they all agreed to be here this morning at 9:30?

Mr. OLSON.—They all said they would be here.

Mr. FRANK.—Who are the respective parties here?

Mr. OLSON.—The libelants are represented by Ira S. Lillick, [54] Esq., and myself; the Pacific Motorship Company, a corporation, is anybody representing that company?

Mr. FRANK.—We represent the receiver for the Pacific Motorship Company, and certain properties of that company.

Mr. OLSON.—Mr. Smith, whom do you represent?

Mr. SMITH.—William E. Gerber, Jr.

Mr. OLSON.—What is his position in this matter?

Mr. SMITH.—You asked me whom we represented, and I have told you. Do you want me to testify to what his capacity is? Mr. Gerber has offered to pay this crew their wages; this crew has refused to accept the wages. Mr. Gerber has paid the crew's wages into court.

Mr. OLSON.—Upon whose behalf?

Mr. SMITH.—Upon his own behalf.

Mr. OLSON.—He has not appeared in the action in any way.

Mr. SMITH.—He has offered to pay the crew their wages, and the crew absolutely and unconditionally refused to accept their wages, and he sent the money into court.

The COMMISSIONER.—Proceed now.

Mr. SMITH.—Before we proceed, I wish to enter an objection to any proceedings in this matter. The commissioner's power was derived from an order of reference made the day before yesterday; at that time the order was that the parties should stipulate as to the facts before the commissioner, and if they could not agree as to the facts that testimony would be taken. We all appeared in accordance with that order immediately before the commissioner. At that time we offered to stipulate—Mr. Gerber offered to stipulate as to the facts. Mr. Olson, representing Mr. Lillick, on behalf of the libelants, refused to state what the facts were to which he wanted us to [55] stipulate. We tried several times to have him make this statement, but he refused to do so, and he refused to put on any testimony, and finally left the office of the commissioner without having done anything. We maintain that the commissioner's power, under the order of reference has expired, Mr. Olson having refused to go ahead, and there is nothing more to be done, the commissioner has no power now to proceed with this matter. I object to any proceeding before the commissioner at this time.

We want to enter a further objection, that in this

matter there are many libelants against the "Benowa," and those libelants have not been consolidated with this one. Some of those libels are prior in time to this one. The "Benowa" was never seized by the marshal under this libel, and there is absolutely nothing pending before the court, and nothing to be tried in the matter of this libel until it is consolidated with all the other libels and the other matters are at issue.

We wish to object further upon the ground that the persons who have filed these other and prior libels are parties interested in this proceeding, and that they have not been notified of this hearing.

We wish to object further that in this case we appeared before Judge Neterer the day before yesterday, and at that time offered to pay the crew their wages, Mr. Gerber offered to pay the crew their wages which they had earned, and to leave any question as to penalty and other demands which the crew have to be tried; Mr. Gerber at that time offered to stipulate as to the facts, and allow the matter to be briefed; at that time the libelants said that they would stipulate to the facts and that that was agreeable to them; then when we had the money and offered to pay it to the crew, the crew refused it and would [56] not take it, and, therefore, the money was paid into court.

Now, when it came to this matter of stipulating to the facts, Mr. Olson, representing Mr. Lillick, has consistently refused to state the facts to which he wished us to stipulate; we do not know what

the facts are upon which he relies. This whole proceeding is a useless waste of time. These facts are all capable of definite ascertainment, and can be ascertained and agreed to by stipulation in ten minutes, if Mr. Olson will put down on paper what he wants us to agree to, and Mr. Olson knows that. This whole matter is just running up charges and taking my time and taking everybody else's time, and I object to the thing as unreasonable and entirely irregular.

Furthermore, I do not think that this case is being prosecuted *bona fide* for the benefit of the libelants in this case, or that—

Mr. OLSON.—Are you taking exception to what we are doing, Mr. Smith, and stating we are not *bona fide* in what we are doing?

Mr. SMITH.—I am. There is one man here who is causing all this trouble, and that man is Captain Renny, who is not a party to this case in any way. If Captain Renny would allow his crew to accept their wages and stop all this nonsense, everybody's time would be saved; but Captain Renny, for purposes of his own, and for the purposes of other persons unknown to us, is making all this trouble, and we most strenuously object to any proceeding before the commissioner of this kind, which is merely a useless waste of time and expense.

Mr. OLSON.—From your remarks and statements about entering into a stipulation as to the facts, I presume you are the only other party interested in this case.

Mr. SMITH.—In this matter, I have explained

to you, Mr. [57] Olson, and you know perfectly well, that Mr. Gerber has arranged by telegraph for the purchase of the claim of the Commonwealth of Australia, which is the plaintiff in the receivership proceeding which has caused the whole delay in the matter of the settlement of these claims. As soon as this was even effectually arranged by telegraph, Mr. Gerber appeared and presented the money and offered to pay this crew its wages. Mr. Gerber has further stated that if you will only stop this harassing proceeding, so as to give him time enough to get the legal documents in shape, he will be able to have the receivership proceeding dismissed and have all these other parties out of the case. So that Mr. Gerber represents the only party interested in the case, and you know that perfectly well.

Mr. OLSON.—Mr. Smith, you are entitled to your opinion, but when we want your opinion as to what we want to do, and the way we want to prosecute our case, we will ask for it.

Mr. SMITH.—I am not offering my opinion as to how you should prosecute your case. I am entering an objection to this particular proceeding.

The COMMISSIONER.—We will let the objection stand as it is now, and the commissioner will make the following statement: This matter—

Mr. FRANK.—Mr. Commissioner, just let me enter my objection first, and perhaps it will save some time. I think it is perhaps better that I should make my objection first.

The receiver objects to proceeding with this cause

upon the ground that all the parties have not been notified, that there are several libels against the vessel for various claims, and that the causes should be consolidated and disposed of as one cause, and all the parties in the several causes should have [58] been notified in order to make the proper appearance in this case.

Furthermore, the cause is not at issue. There is a libel of intervention on behalf of the Commonwealth of Australia, upon which the time to plead has not expired. There is not an answer on file.

Mr. OLSON.—Pardon me; we have filed the answer.

Mr. FRANK.—Other parties, including the receiver, have not answered, and the time for answering has not elapsed as yet.

The COMMISSIONER.—The parties appeared before me on the afternoon of the 27th, coming directly out of court, with the suggestion that this matter had been referred to the commissioner to have a stipulation made before him, or such evidence adduced as might be offered. At that time, the commissioner had a previous engagement that had to be attended to, and suggested that the matter stand adjourned for twenty minutes or half an hour. Upon his return, all the parties had left the commissioner's office. Subsequently, the commissioner was communicated with by Mr. Olson over the telephone, who stated that the matter would be taken up on this date at 9:30 A. M., at his office, all parties having been notified to be present. Under these circumstances, I will now

proceed and take such evidence as may be offered on the part of the libelants, subject to the objections already noted. Call your first witness.

Mr. OLSON.—In the libel, the third from the last libelant is named as S. J. Wright; it should be S. J. Ryan; will it be agreed that that may be amended to read as S. J. Ryan?

Mr. SMITH.—We won't agree to anything of that kind.

Mr. OLSON.—Then I will ask the Court for leave to amend the libel by inserting S. J. Ryan instead of S. J. [59] Wright, which is the third from the last libelant named in the libel.

Mr. FRANK.—I have no objection to it.

Mr. OLSON.—Mr. Smith, do I understand you are going to make objections to everything introduced, and not to agree to anything?

Mr. SMITH.—Certainly not. I intend to make objections to those things which I feel are objectionable. You asked me to agree now to an amending of the libel. I said I could not agree to it, for the simple reason that this is a question of taking some testimony now. I think that it is testimony which cannot properly be taken now. There was no suggestion made, prior to this moment, that you intended to amend your libel. I have not had a chance to investigate the proposed amendment to the libel. I think it is utterly improper for you to ask at this time that the libel be amended, and certainly I cannot consent to it at this time.

The COMMISSIONER.—Let us proceed and take the testimony now subject to all the objections.

The parties are all here now, and the situation is such, this being an action for seamen's wages, that I think all the evidence should be adduced at this time.

Mr. OLSON.—Will it be admitted that this is a certified copy of the shipping articles under which the crew shipped from the port of Baltimore on the 21st day of January, 1921?

Mr. SMITH.—Are you asking me that?

Mr. OLSON.—Yes.

Mr. SMITH.—I have never seen the original articles, so I cannot say. If it will help you in any way, I will admit it subject to our right to correct them if we find it is not a correct copy. [60]

Mr. FRANK.—There is no objection to that.

Mr. OLSON.—I offer in evidence what purports to be a certified copy of the shipping articles, dated the 21st day of January, 1921, between the master and seamen of the steamship "Benowa" for a voyage via one or more coastwise ports to one or more ports on the west coast of the United States.

Mr. SMITH.—Are you offering that now?

Mr. OLSON.—Yes.

Mr. SMITH.—I do not want to make an objection to it, provided you will agree that if I find that it is not a true copy I will have the right to correct it.

Mr. OLSON.—That will be agreeable.

The COMMISSIONER.—I will mark it Libellant's Exhibit 1.

(The document was here marked Libellant's Exhibit 1.)

Testimony of William C. Renny, for Libelants.

WILLIAM C. RENNY, called for the libelants, sworn.

Mr. OLSON.—Q. Captain, you were master of the steamship “Benowa” on the 21st day of January of this year? A. Yes.

Q. Is this your signature on the shipping articles? A. Yes, sir.

Q. Have you seen this copy of the shipping articles, this certified copy of the shipping articles?

A. Yes, sir.

Q. I will ask you if you were present at the time the shipping articles were signed by the officers and the members of the crew? A. Yes, sir.

Mr. FRANK.—Mr. Olson, if this will be of assistance to you, we are ready to stipulate that the libelants named in the libel signed articles on the 21st day of January, 1921, for a voyage from the port of Baltimore to the port of San Francisco; that the wages per month were as named in the articles which you [61] have introduced in evidence; that the vessel arrived in San Francisco on that voyage on the 28th of February, 1921; that the vessel was discharged on the 17th day of March, 1921. Will that simplify matters for you?

Mr. OLSON.—And will it be further stipulated that no payment has been made to any of the officers or members of the crew for the services performed under these shipping articles?

Mr. SMITH.—There were advances made.

The COMMISSIONER.—Have you the respective members of the crew here?

(Testimony of William C. Renny.)

Mr. OLSON.—They are not all here.

The WITNESS.—The crew did not sign articles for a voyage to San Francisco; if you will read these articles you will find they did not sign any such agreement.

Mr. OLSON.—The articles are introduced in evidence, and they speak for themselves.

Q. Captain, have you paid any of these libelants any wages on behalf of the steamship “Benowa,” or her owners?

A. The first assistant engineer received \$100 in Norfolk, Va.; that was sent his wife by the special agent of the owners of the “Benowa”; that was sent independent of the articles altogether.

Q. What is the first engineer’s name?

A. The first assistant engineer, J. Burton Hughes; \$100 was wired to his wife.

Q. Has any other member of the crew received any payment?

A. Nothing on account of the owners of the ship; I have myself advanced about \$130, I think it is, in small moneys since I have been here.

Q. That is, out of your own pocket?

A. Out of my own pocket, yes.

Mr. OLSON.—I will ask that this be introduced in evidence and marked Exhibit “A.” [62]

The COMMISSIONER. — Libelant’s Exhibit “A.” I have already marked them, Mr. Olson.

Mr. OLSON.—Q. Do you know what provisions you had on board when the vessel arrived at the port of San Francisco on February 28, 1921?

(Testimony of William C. Renny.)

Mr. SMITH.—I object to that as utterly immaterial, and not having any bearing on the issues in this case.

A. Approximately, I should say, we had about 90 cans of emergency stores, that is, canned goods that are put aboard for emergency, and half a sack of flour—probably 70 or 75 pounds of flour; there were a few spices, some curry powder, a little tea—may be 10 or 15 pounds of tea. There was no sugar or no butter. I think the wireless man has a telegram in his pocket that will help on the shortage of provisions proposition. I wired in here, I think two days before we arrived, that we were short of provisions. We were short of provisions some four days before we got to San Francisco, barring these emergency stores.

Q. After you arrived at the port of San Francisco, were any supplies furnished you by the steamer "Benowa," or owners?

A. Yes, Mr. Moran sent aboard, the day that we arrived, a case of milk and I think a sack of spuds, and I don't remember just what else—a few of the actual necessities were sent aboard that night.

Q. Can you state how long those provisions lasted?

A. They would last probably three days.

Q. Did you receive any provisions from the steamer or from the owners after that date?

A. Yes, on the third day, or maybe the fourth day after our arrival, we received some fresh meat and some fresh vegetables which would last about two days.

(Testimony of William C. Renny.)

Q. Did you purchase or arrange for the purchase of any provisions [63] for the crew and yourself on your own account? A. Yes, sir.

Q. Will you state when that was done?

A. I think that was first arranged for on the 9th, or it may be the 10th, of March; that would be about nine or ten days after the ship got in.

Q. At that time, were there any provisions left on board of the ship which had been furnished by the steamer or owners?

A. Practically nothing, excepting some of the preserved beef, the emergency stores. There is some of that on board yet.

Q. Have you been furnishing supplies for the crew and for yourself on your own account since that day? A. Yes, sir.

Q. Have you made any demands upon the owners of the steamer for supplies for the crew?

A. Yes, sir.

Q. Will you state what you did relative to that?

A. I made two or three requests through Mr. Moran and Mr.—what is the name of that man who was managing the company—Mr. Ringwood; and I think on the morning of the 9th, when we were really broke for stores, and there was hardly anything left at all, excepting the canned meat, I asked Mr. Moran for a further supply of stores. He said I would have to apply to Mr. Ringwood. I waited for Mr. Ringwood, and finally met him on the stairs; the chief officer of the ship was with me;—I met him on the stairway leading up to his office

(Testimony of William C. Renny.)

and I told him that we were entirely without stores, excepting for this canned meat, and that I wanted stores put aboard that night; he said, "You don't have to talk to me about anything; I don't want to talk to you; you go and talk to Mr. Moran." I said, "I have already talked to Mr. Moran." "Well," he said, "don't talk to me any more; I don't want to see you around the office." I believe I went back to Mr. Moran and asked him if he could do anything in the matter, and Mr. Moran said no, he could not do anything. Then, the following day, [64] I believe, the crew made a demand for more food, and for money. I had already asked Ringwood if he could supply money for me to advance to the crew what they were entitled to on arrival in port, which was half their wages. They had decided by this time that the ship was not to proceed to Puget Sound, to Bremerton, that she would most likely discharge here; consequently, the crew had the right to be paid half the money that was coming to them. That was refused; they would not give me anything. So the crew demanded an appeal to the Shipping Commissioner, Mr. MacArthur, and I took a body of representatives of the crew before Mr. MacArthur the following day. I think that was the 10th. The crew put the case before him. They said they had demanded food and money from me, and that I had refused to pay them or feed them. Then it was up to Mr. MacArthur to make me do something, to make me pay them. Of course, I had not any money, and I

(Testimony of William C. Renny.)

could not pay them. Mr. MacArthur then called the office of the operating company. He asked for Mr. Comyn. Mr. Comyn was not there. He asked for Mr. Ringwood; Mr. Ringwood was not there. He asked if there was anyone in the office that could be sent to his office while the crew of the "Benowa" were present in his office, to answer questions, and somebody said—I don't know who was at the other end of the line—that Mr. Moran would come down. Mr. Moran came down. Mr. MacArthur put a few questions in the usual way. Mr. Moran could do nothing. He said he was not an officer in the company, he had not any authority to say anything; he was not just quite sure what he had come to the Shipping Commissioner's office for at all. The Shipping Commissioner said, "Mr. Moran, can you supply that ship's crew with provisions at once?" Mr. Moran said, "No, I cannot supply the crew with any provisions at all." He said, "Why can't you?" "Because," he said, "the company, as I understand it, has not got a dollar in the treasury, [65] and they have not got a dollar's worth of credit anywhere." He said, "I would suggest that, under the conditions, the captain do the best thing he can." Well, I did the best thing I could, and bought provisions, and I have been buying them since.

Q. Did you pay for those provisions, Captain?

Mr. SMITH.—I object to that—

A. (Intg.) The provisions are not yet paid for.

Mr. SMITH.—Just a moment. I want to move

(Testimony of William C. Renny.)

to strike out all of that last answer, because it is not responsive to the question, all of that portion of it dealing with the crew being paid, and these interviews with MacArthur and Moran, and all the rest of it. Now, to the next question, as to whether or not the provisions have been paid for, I object to that as utterly immaterial.

Mr. OLSON.—Q. Did you pay for the provisions, Captain?

A. No, the provisions are not paid for. I simply got a credit, and that is all.

Q. Captain, have you and the crew been on the ship since it arrived at the port of San Francisco?

A. Yes, sir.

Q. Since the discharge of the cargo from the vessel, have you and the crew been remaining on board the vessel?

A. With the exception of the chief engineer, the boatswain and the chief cook. The chief cook objected to doing any work aboard the ship, so I fired him ashore. He is ashore now. The chief engineer went ashore on his own account; the boatswain also went ashore.

Q. During the time that you and the crew have been on board the ship, have any services on behalf of the vessel been performed?

A. Yes, they are performing their services on behalf of the vessel daily. [66]

Q. Will you state generally what those services consist of?

A. The engineers are keeping the regular watch

(Testimony of William C. Renny.)

in the engine-room, attending to the pump, and to the auxiliary machinery, turning over the engines probably every two or three days, and supplying the water for the wetting down on the ship. The crew are keeping the regular watch. The officers are keeping the regular watch, keeping the ship clean, and attending to the usual duties on board the ship.

Q. Has the vessel required the pumps to be worked during any of this time?

A. She requires the pumps to be worked every day.

Q. What is the purpose of using the pumps?

A. To keep the water out of the ship, to keep the ship as free as possible from water.

Q. If this ship had not been pumped out by the crew, would there be any danger of the vessel sinking?

A. I don't think there would be any ship at all if there had been no crew aboard the ship. Of course, they could have put somebody aboard to pump.

Q. Since you have been in the port of San Francisco, has anyone been sent on board of the vessel to take care of it on behalf of the owners?

A. No, sir.

Q. Have you signed clear of the shipping articles at the port of San Francisco?

A. No, sir, I do not sign the shipping articles; I just sign as a party to the articles, but I do not sign on the articles or sign off at all.

Q. Have any of the crew signed off in your pres-

(Testimony of William C. Renny.)

ence, or to your knowledge?

A. No, sir, none of them have had the opportunity of signing off.

Q. When you made the demands for wages, did you make any demand for transportation back to the East coast of the United States, to the respective homes of the libelants? A. Yes, sir.

Q. What answer did you receive, if any?

A. I don't remember any [67] answer that we got; I didn't get any answers at all when I put questions. Nobody up in that office wanted to talk to me. They wanted me, I suppose, to pay the ship's crew from some money that I might raise on the outside. I don't know what they did want. I know they didn't want me. That is all there was about that. I was ordered out of the office, and I have stayed out of the office ever since. Mr. Moran has been the only one who has been kind of gentlemanly to me in the office. Once or twice he has asked me to call in, not to stay away. I had nothing to go there for. For two or three days my mail was going there, but as soon as I could switch it and have it sent somewhere else, I had it switched, so I would not have to go there at all.

Q. You don't make any entries in the log, at all, do you, Captain?

A. No. Sometimes I keep a running daily log of my own. The log is kept by the officers of the ship.

Cross-examination.

Mr. FRANK.—Q. Captain, the first request that

(Testimony of William C. Renny.)

you made for wages was on the 9th of March, was it?

A. No, sir, it was previous to the 9th of March. I am not just sure about the dates, mind you, Mr. Frank. We will say around the 9th of March.

Q. It was about the 9th of March that you went before the Commissioner?

A. I believe that is the date we went before the Commissioner.

Q. And then you went to see Mr. Moran?

A. Oh, no, Mr. Moran was called down to the office of the Commissioner. I never saw Mr. Moran after that to ask him about wages or provisions.

Q. And Mr. Moran stated that the company had no money? A. Had no money.

Q. And that is the reason—

A. And he could not get credit for [68] a dollar on the outside. That is what Mr. Moran told me.

Q. Did he say that legal proceedings had been instituted for the appointment of a receiver?

A. No, sir, he did not. I don't think he knew, probably, that legal proceedings had been started.

Q. He simply said they could not pay the wages or get provisions, because they were without funds?

A. They were without funds.

Q. And unable to raise any, because they were without credit? A. No credit.

Q. And that was the only reason he assigned?

A. That was the only reason he gave, yes.

Q. You were notified that your services were no longer desired on the vessel, were you not, Captain?

(Testimony of William C. Renny.)

A. No, sir.

Q. The crew was notified, wasn't it?

A. The crew was notified on the 7th of April—

Mr. OLSON.—I ask that that answer be stricken out, and I would suggest that you ask what was done, rather than ask for the opinion and conclusion of the witness.

Mr. SMITH.—That is a question of fact.

Mr. FRANK.—And, furthermore, Mr. Olson, this is cross-examination.

Q. Are you sure it was on the 7th?

A. Absolutely.

Q. It might have been before that?

A. I am absolutely certain it was the 7th of April.

Q. How do you fix that time?

A. Because I acknowledged receipt of the letter. That letter was given by Mr. Chidester, and I acknowledged receipt of that letter. In my acknowledgment, I told Mr. Chidester that I had just received that notice. My acknowledgment was dated the 7th.

Q. Have you a copy of the letter?

A. There is a copy here, I think Mr. Olson has a copy. [69]

Q. Your acknowledgment was dated the 7th?

A. I received the letter on the afternoon of the 7th, late in the afternoon it was handed to me.

Q. You do not know the date of Mr. Chidester's letter?

A. Yes, Mr. Chidester's letter was dated the 1st of April, but I received it on the 7th. You asked

(Testimony of William C. Renny.)

me when I received it. That was the first notice the crew had from anybody.

Q. And the notification came to you through the mail on the 1st of April, didn't it?

A. No, it was not mailed; there was not a stamp on it. There was not a stamp on the envelope.

Q. Of course, the crew might have had notice that their services were no longer desired and you might not know of it. Isn't that so, Captain?

A. Well, I suppose that is so, because I don't know everything the crew has been told.

Q. And so the crew might have had payments on account of their wages and you might not be aware of it?

A. That is quite possible. I was asked as to what payments I knew of; I don't know of anything, except the few dollars I had given out, and I had to borrow it, by the way; I don't keep a bank account here. I had to borrow it in order to give the men anything. I think it was somewhere about \$120 or \$130, or maybe a little more than that.

Q. All you know is that the crew signed on for the wages at the rate per month recited in the shipping articles?

A. Yes, sir.

Q. And you paid them certain amounts of money?

A. Yes.

Q. Whether or not there are other credits, you don't know anything about that, do you?

A. I don't know of any other credits there might be.

Q. I say, you don't know whether there were any,

(Testimony of William C. Renny.)

or not? A. No, I don't know. [70]

Q. When is the date the chief engineer, the boatswain and the cook left the vessel?

A. It is all in the log-book. I could not give you those dates. The cook left very early in the game. He started being troublesome very early. He said he did not have to work any more, and he was not going to. I said, "All right, if you are not going to work, get off the ship." And he did. The chief engineer left the ship without notifying anybody, along about the first of this month. The boatswain, I think, left about the same time. Everything is in the mate's log-book. He knows when they left; I don't know when they left.

Q. Since the vessel was discharged, such men as remained on board the vessel, and you, if you remained on board, remained of your own volition, did you not?

A. We remained because we were not discharged. You can call it of our own volition, if you wish, but we were not discharged from the ship, and, consequently, we had no right to leave.

Q. You were not requested by the owners to stay there, were you?

A. I was never requested by the owners even to go aboard the ship at any time. I have been fifteen months or more on that ship. I joined her on the 1st of January of last year. I was ten months on her before I knew that she was in difficulty at all. This is the second bankruptcy proceeding I have had to go through with, if this is bankruptcy; I

(Testimony of William C. Renny.)

don't know what the dickens it is, it is a case where they won't give us our money. I spent 37 days once before trying to get our money.

Q. Since her discharge, Captain, there has been no request for the services of the crew or of yourself by either the owners or the receiver?

Mr. OLSON.—I object to the question on the ground it assumes there is in evidence the fact that the crew was discharged, when such is not the fact.
[71]

Mr. FRANK.—I said, since the discharge of the vessel.

A. Since the discharge of the vessel, we have been refused our pay, and we have never been asked to leave the ship, until Mr. Chidester sent the notice, which I received on the 7th of this month, and which was dated the 1st of the money.

Q. And he sent you a notice that neither your services nor—

A. No, sir, I beg your pardon, my services have never been dispensed with.

Q. The services of the crew?

A. The services of the crew, yes, but I am not one of the crew, I am the master of the ship.

The COMMISSIONER.—Q. And you are not going to desert the ship?

A. I cannot desert the ship; I have to hand the ship over to somebody. Nobody has come and asked me for the ship; if anybody comes along with my money and asks me for the ship, I will give them the ship, I will be very glad to do it. And that is

(Testimony of William C. Renny.)

all that the sailors want, too.

Mr. FRANK.—That is all.

The COMMISSIONER.—Any further cross-examination?

Mr. SMITH.—Yes. Q. I show you these shipping articles, which the libelants have introduced as exhibit 1. Did you ever see them before?

A. Yes, sir.

Q. Where did you see them?

A. In Baltimore; I saw them every day aboard the ship until about two weeks ago; I kept them in my own safe; I carried them here and gave them to Mr. Olson.

Q. You mentioned a letter which you wrote acknowledging this notice from Mr. Chidester; you said there was a copy of it here; I would like to see it.

A. (Addressing Mr. Olson.) Have you got that copy?

Mr. OLSON.—I was looking for it, but I can't find it. Have you a copy of it, Mr. Frank? [72]

Mr. FRANK.—No, I have not.

Mr. OLSON.—It might be in another one of my files. I have a notice that was given to the crew of the "Babinda," which is the same in all respects. I understand that this is a similar notice; it is a notice to the crew of the motorship "Babinda."

Mr. SMITH.—Q. I think Captain Renny understands what I am talking about, don't you, Captain?

A. Yes, I know.

Q. That other paper is not the one we are dis-

(Testimony of William C. Renny.)

cussing at all, is it?

A. The paper Mr. Smith wants is the copy of the letter I sent Mr. Chidester, in acknowledgment of receiving his letter with this notice attached.

Mr. OLSON.—Q. Who has the original?

A. Mr. Chidester has the original; it was mailed to him.

Mr. OLSON.—Have you it here, Mr. Chidester?

Mr. CHIDESTER.—I have not it here.

Mr. SMITH.—I am asking for the copy.

The COMMISSIONER.—Q. Captain, did you keep a copy of that letter? A. Yes.

Mr. OLSON.—You are asking for a copy, Mr. Smith; there is no appearance on file by you on behalf of anyone in this case.

Mr. SMITH.—Mr. Gerber is interested, because he has offered to pay this crew its wages and the crew has refused to take its wages. I am asking Captain Renny now about this copy of this letter which he says he has here. If you don't want to produce it, you don't have to; there is nobody here that can make you produce anything. I am asking you for it.

Mr. OLSON.—And I am asking you who you appear for, and whether or not an appearance has been filed.

Mr. SMITH.—And I have told you who I appear for. I have explained to you often enough the circumstances under which [73] Mr. Gerber comes into this case.

Mr. FRANK.—Mr. Smith, do I understand that

(Testimony of William C. Renny.)

there has been a deposit to cover the wages of the crew, made in the registry of the Court, on behalf of the Pacific Motorship and the receiver?

Mr. SMITH.—The deposit has been made by Mr. Gerber. Mr. Gerber, as I have said, is now perfecting negotiations in this matter.

Mr. FRANK.—And it is for the benefit of the receivership?

Mr. SMITH.—Mr. Gerber will eventually be the sole party in interest in defending this claim. Mr. Gerber has made that deposit. At the earliest possible moment, even prior to the time that the documents have been perfected by which he can legally be substituted, he will be the only party in interest.

Mr. FRANK.—And that covers wages to the date of March 17, 1921?

Mr. SMITH.—It does.

Mr. FRANK.—And costs?

Mr. SMITH.—I have asked Mr. Olson what his costs were, and he has refused to tell me. I have offered, in writing, to pay the costs as soon as he can state them to me.

Mr. OLSON.—I stated to you I didn't know what the marshal's costs are. The marshal's costs are running along now, and I have not a statement of them at hand.

Mr. SMITH.—You know perfectly well that the marshal's costs are being paid on behalf of other libelants, not including these.

Mr. OLSON.—Mr. Smith, I resent your continued

(Testimony of William C. Renny.)

statement that something is being done, and that I know perfectly well about it. If you want to come out and make a stronger statement, [74] you might as well do it. I think you should at least be courteous enough not to make such remarks.

Mr. SMITH.—I think that is perfectly courteous. I am trying to be courteous, and to conduct this thing in as orderly a way as I can under the circumstances.

The COMMISSIONER.—Proceed.

Mr. SMITH.—Q. Did you dictate this letter?

A. No, that was dictated by Mr. Lillick.

Q. In this office? A. In this office.

Q. You testified about these provisions that were on board the “Benowa” at the time of her arrival here, and the various times later; to refresh your recollection, I will say that I heard you say there was a list kept of those provisions. Is that so?

A. I said that there was a list of those provisions turned in, that I gave a list to the company, Mr. Moran, or Mr. Ringwood, or whoever received that, immediately on arrival in port, because I had wirelessed in that we were short of provisions. There is a list in that office. There is another list that the receiver has got, Mr. Chidester. He has a copy, or he has pretty nearly a copy of the list that was handed in the first day I arrived here, to the operators of the “Benowa.”

Q. Did you keep copies of this list?

A. I did not.

Q. Did anybody aboard the vessel?

(Testimony of William C. Renny.)

A. The steward did.

Q. Has he copies of it now?

A. I think that is the last copy, the one that was sent to Mr. Chidester this morning; somebody from Mr. Chidester's office got me over the telephone last night and said they would like to get a copy.

Mr. OLSON.—Mr. Smith, Mr. MacArthur stated yesterday that he was very busy, and so I told him that we would arrange so that he could give his testimony without waiting. Is that [75] agreeable to you?

Mr. SMITH.—Surely.

The COMMISSIONER.—Let him come forward.

Testimony of Walter MacArthur, for Libelants.

WALTER MacARTHUR, called for the libelants, sworn.

Mr. OLSON.—Q. Mr. MacArthur, what official position do you occupy at the present time?

A. United States Shipping Commissioner.

Q. And you have been such for several years last past? A. Yes, sir.

Q. Do you recall any time during the month of March, or the month of April, whether or not the master or the crew, or any members of the crew of the motorship "Benowa," came to your office?

A. Yes, sir, they did.

Q. You do not recall the particular officers who called, do you?

A. I recall quite distinctly that the master called, and the mate, I think, and the boatswain, I think.

(Testimony of Walter MacArthur.)

My recollection as to the master having called is quite clear.

Q. Did you have any conversations with them at that time? A. Yes.

Q. Do you recall what date it was?

A. No, sir, I do not.

Q. If they should testify that it was on or about the 9th day of March, do you believe that that would be approximately correct?

Mr. SMITH.—I object to that as highly leading and suggestive.

A. Yes.

Mr. OLSON.—Q. Did you make any memorandum in reference to the conversations?

A. No, sir.

Q. Do you recall what the conversations were, and what took place at that time?

A. If my recollection serves me, the master called, with a view to getting my advice as to the law [76] in respect to the payment of the crew's wages, money in port, and such matters as that, and as to whether or not his voyage was terminated here, and so on, and questions of that nature.

Q. Can you state what you said to him?

A. I told him what I thought his legal position was with reference to the right of the crew to their discharge within four days following the termination of the voyage—following their discharge from the ship upon the termination of the voyage, or within twenty-four hours after the cargo was discharged, whichever first happened, and that—

(Testimony of Walter MacArthur.)

Mr. FRANK.—Mr. MacArthur, I think it is sufficient if you state that you told him your version of the law; the Court will determine what the law is.

Mr. OLSON.—I ask that his statements go in, and the objections can be made after the statement is completed.

A. May I answer the question in my own way?

Q. Yes.

A. As I said, I advised the master as to the law with respect to the discharge and the payment of the crew upon the termination of their voyage, to the effect that the crews are entitled to be paid in full within four days after the termination of a voyage, in a foreign trade, or in a trade between the Atlantic Coast and the Pacific Coast, or *vice versa*, or within 24 hours after the discharge of cargo, whichever first happened; then as to the question of whether or not the voyage was terminated here, I said that that would depend upon the manner in which the articles were prepared. I do not recall at this moment having seen those articles at any time; they were described to me by the master as being a voyage from some port on the Atlantic Coast to Bremerton, Washington, if my recollection serves me, and I said that in that case the crew, of [77] course, would not be entitled to their discharge until the vessel arrived at Bremerton, and until the cargo was discharged at Bremerton. Then subsequently the master notified me that the cargo was being discharged at Cali-

(Testimony of Walter MacArthur.)

fornia City; then I said that in that case it would appear as though the voyage were ended, although there would be a question as to the master's right to require them to proceed to Bremerton if the vessel, herself, were to go to Bremerton; but if the vessel were not to go to Bremerton, that the voyage would be ended here. That was, in general, the nature of the questions asked by the master and the nature of the answers which I gave to him.

Q. At that time, did you communicate with anyone else on behalf of the master and the crew, or at his request?

A. I don't quite get your question.

Q. Did you communicate with the office of the owners of the motorship "Benowa"?

A. Yes, I did.

Q. Will you state what took place with reference to that communication?

A. I rang up the firm which I was informed was operating that ship; I think they called themselves McCormack & McPherson—no, that is not it—Comyn, McCall & Co., I am not quite clear as to the name of the firm. I believe that Mr. Ringwood was acting practically as the operator of the ship. I rang him up through his office, the office of his firm, and after some difficulty and delay I managed to get a gentleman to come to my office who claimed to represent the firm. I think he was the port steward, and I believe his name was Moran, or some such name as that. At that time, the question was as to how the crew were to be fed; it

(Testimony of Walter MacArthur.)

appears that at that time there was no food on the ship, and they were in a quandary as to how they were going to get their food. I asked this gentleman, who was supposed to [78] represent the operator or owner of the ship, what he proposed to do about the crew; in other words, did he propose to discharge the crew and pay them their wages; or, if not, did he propose to carry out his obligations to the crew while they still remained members of the crew in the course of the voyage, namely, to give them money in port, and the proper provisions, and so on and so forth. He answered, in substance and to the effect, that he had nothing at all to do with it, and could not do anything, had no money, could not give the men any money, had no authority to order them discharged, no authority to buy provisions, no money with which to do so, and practically washed his hands of the entire business. Then I asked him if he would guarantee or was in a position to endorse some sort of note, or something given by the master—the master had notified me that he could himself, or would endeavor, at any rate, to secure provisions on credit, so that the crew could be fed, and he wanted to know if the owner of the vessel would in some way or other endorse that action, so that they could be held legally responsible in the long run. I asked Mr. Moran if he could do that, and he said no, he had no authority to do it. In other words, I could not get anything from that gentleman, or from anyone else representing the owners

(Testimony of Walter MacArthur.)

of the ship, in the nature of an agreement to do anything at all.

Q. Do you recall anything else that took place on that day?

A. I had numerous conferences with the master, but they were all to the same effect, and I cannot recall any particular incident that took place on any of these occasions, other than as I have stated here.

Q. Are you familiar with the regulations which provide the amount that the officers and crew are respectively entitled to [79] when they furnish their own subsistence?

Mr. SMITH.—I object to that as immaterial; that is a matter of law.

Mr. FRANK.—And that is provided for in the shipping articles?

Mr. SMITH.—**And it doesn't** matter whether he is familiar with those regulations, or not. You can establish the regulations at any time. This is simply a waste of time, Mr. Olson.

A. I understand that question to be directed to those cases in which seamen subsist themselves ashore, as distinguished from cases in which they are fed on the ship in accordance with the scale, or some other system of feeding on the ship?

Mr. OLSON.—Yes; answer that question.

Mr. FRANK.—We will have to object to the question on the ground he is asking the witness to testify as to what the law is; the Court will determine what the law is.

(Testimony of Walter MacArthur.)

The COMMISSIONER.—The objection is noted; let the question be answered.

A. Sometimes it is stipulated in the ship's articles that the crew shall receive a certain amount per day for subsistence, but that is usually intended to cover cases of subsistence during transportation, in which case it is usually \$5 a day. That \$5 a day covers the cost of meals in the dining-car. In cases of men who subsist themselves ashore, as the expression goes, there a regularly established rate recognized by the ship owners, on the one hand, and the seamen, through their organizations, on the other; that runs from \$2.75 for sailors, firemen, cooks and stewards, up to \$5 or \$6 a day in the case of licensed officers. That is not stipulated in the articles, as a rule; that is a customary arrangement, recognized by all [80] parties, and is operative irrespective of any specific agreement in the articles to that effect; it is understood that if a seaman, while a member of a crew, is required to board himself ashore in any port, he shall receive these respective sums, \$2.75 in the case of so-called unlicensed men, and from \$3 up to \$6 in the case of licensed officers, such as mates, engineers and masters.

Mr. SMITH.—I move to strike out the answer as not responsive to the question. He was asked if he was familiar with certain regulations, and he could answer that by saying "Yes" or "No."

Mr. FRANK.—And, furthermore, no custom has been proved.

(Testimony of Walter MacArthur.)

Mr. OLSON.—Q. Can you state whether or not that is the custom, from the experience which you have had as shipping commissioner in the port of San Francisco?

A. I know it to be the custom universally observed. There is never any question about it.

Q. Can you state what is the custom when men are discharged from a foreign port, or away from their home port, as to the subsistence they are to receive during transportation to their respective homes?

Mr. FRANK.—Our objection to this testimony on the question of custom will be understood to be continued throughout. And we make further objection on the ground that the contract between the seamen and the ship owner controls.

Mr. SMITH.—We enter the same objection.

A. When a seaman is discharged in a foreign port, if he is provided with transportation back to his home port at the expense of the owner, in accordance with the shipping agreement, then, of course, he would be subsisted, as the saying is, on the steamboat, if he is traveling by water; that would be part of [81] the transportation; in other words, his ticket on the steamboat would entitle him to meals on the steamboat. Then, supposing he arrived at New York and was bound to San Francisco, or supposing he arrived at San Francisco and was bound to New York, then he would be entitled to \$5 a day on the train, for five days traveling across the continent, or \$25 in all. That would be for unlicensed men. The licensed

(Testimony of Walter MacArthur.)

men would probably be entitled to—they would be entitled to more. In other words, a licensed man would be entitled to a railroad ticket, a sleeper, and to \$5 a day during the period of his transportation by rail. That presupposes transportation at the expense of the owner by virtue of something in the shipping articles, either express or implied. If he were transported back by the Government, by a consul, the situation would be different; his rights as to subsistence money, and all that sort of thing, would be different, the consul would send him back as economically and as cheaply as possible.

Mr. OLSON.—Q. Can you state whether or not it is customary to pay men their wages during the time that they were being transported to their home port, where they sign the shipping articles?

A. That varies according to the circumstances of the case. It frequently happens that the articles contain a stipulation to the effect that upon discharge the seaman shall be entitled to transportation and wages to the port of shipment; in that case, wages continue during the period of transportation. But in the absence of a specific stipulation to the effect that wages shall continue during the period of transportation, then the wages stop at the time of discharge, and do not continue during the period of transportation. In other words, the payment of wages is not implied, it must be expressed. Otherwise, it is understood that wages

(Testimony of Walter MacArthur.)

are not paid during the period of [82] transportation.

Cross-examination.

Mr. FRANK.—Q. And that applies to subsistence as well, does it not, Mr. MacArthur?

A. No. Subsistence is always implied; there is no necessity for any specific agreement to pay subsistence money, that is always implied.

Q. That is your interpretation of the contract, isn't it?

A. Well, I am giving you my interpretation, and not anybody else's interpretation.

Q. You have not any specific contract before you; you say that is generally the interpretation of the contract?

A. That is the idea, that is the general interpretation of the contract.

Q. Your interpretation of it?

A. That is the general interpretation of it.

Q. With regard to this custom that you speak of, some follow it and some do not; isn't that so?

A. Which custom are you referring to?

Q. The custom of providing subsistence.

A. Why, my dear sir, you are entirely mistaken there; it is a uniform custom, never varied from; everybody does it, excepting once in a while when you run up against somebody who has not money, who is bankrupt, or busted, and then they try to beat the custom. It is of universal application. Nobody ever objects to it. It is usually paid before the man gets on the train. The money is given to

(Testimony of Walter MacArthur.)

the man in his hand. It is never questioned. It is not an optional matter, at all. It is not a matter of some ship owners doing this and some ship owners doing the other; they all do it.

Q. It is a matter in their discretion, isn't it?

A. I don't know just exactly what you mean by that.

Q. I mean, they pay it if they choose to, and if they don't choose [83] to they don't pay it?

A. No, you are entirely mistaken there; it is a matter of law. In other words, the ship owner who agrees to give the seamen transportation, under the shipping articles, from the port at which he is discharged, back to the port at which he agreed to be discharged, or the port of shipment, he is bound to give him subsistence. He cannot, by giving the man a railroad ticket, say that that ends it. You cannot do that under the law.

Q. Then you are testifying to a matter of law, and not a matter of custom. Is that it?

A. It is a matter of law, customarily practiced, customarily observed, uniformly observed. Mr. Commissioner, I want to make it as clear as I can here that there is no alternative or option to the ship owner in this matter; this matter of buying transportation and subsistence is a matter of law, and of custom, too, if you wish to put it that way. In other words, it is a legal custom which ship owners uniformly and universally observe, and there is not any alternative, they have no alternative but do it. In other words, the obverse of this gentleman's question is

(Testimony of Walter MacArthur.)

this, that the ship owner would absolve himself of his obligations and discharge all his obligations to provide his seamen with transportation by giving them a railroad ticket, putting them on a car, and letting them stand up, or lie down, or hang by their eyebrows the whole trip across the continent, and feed themselves. That is not the case at all. He must give them a berth and three meals a day. That is transportation and subsistence in the proper sense of the term. The word "transportation" implies sleeper and subsistence.

Q. That is your interpretation of the law?

A. Yes, and my knowledge of the facts as they are practiced here uniformly in [84] every instance by ship owners in this port.

Mr. SMITH.—Q. In these conversations that were had down in your office, where you had somebody that represented the owner of the ship, or whom you thought represented the owner of the ship, did you at any time have Mr. Chidester there?

A. I cannot say that I had. I am a very poor hand at remembering names.

Q. Do you know Mr. Chidester, this gentleman sitting over here?

A. I have so many visitors that I cannot recall them all. I may have seen the gentleman before, but I cannot remember his being there.

Q. Did you hear that there was a receiver appointed to take charge of those boats?

A. Yes, I heard something to that effect. Did

(Testimony of Walter McArthur.)

you have the receiver there?

A. Not that I know of.

Q. Did you have the receiver's attorney there?

A. No.

Q. Did you have anybody there purporting to represent the receiver?

A. No; I had a gentleman there who purported to represent the owner.

Q. And that gentleman was a gentleman whom you reached by telephone at the office of Comyn, McCall & Company? A. Yes, sir.

Q. And you did not try to find anybody representing the receiver, or the owner, outside of at that office?

Mr. OLSON.—At that time the receiver was not appointed, Mr. Smith, if I may make the suggestion.

Mr. SMITH.—I will take all the suggestions you want to make when I am ready for them. I am cross-examining this witness now, and I am asking him the people he had there.

Q. You know of nobody being there outside of somebody from the office of Comyn, McCall & Co.?

A. I communicated with the office of the owner of the ship, so far as I could determine the ownership of that vessel; I communicated with that office. [85] I knew nothing at all about any receiver, or anybody else.

Q. And the office with which you communicated was Comyn, McCall & Co.? A. Yes.

Q. And you made no effort to ascertain whether

(Testimony of Walter McArthur.)

there was a receiver or any other person interested in these ships, outside of telephoning the office of Comyn, McCall & Co.?

A. I did not consider that I was under any obligation to do anything of the kind.

Q. I don't think you were under any obligation, either, but I am simply trying to get the facts.

A. And I am simply telling you, so as to remove the appearance in this record of any obligation on my part to communicate with the receivers, or anybody else; when a seaman comes into my office over a question of his wages, I consider it my obligation to communicate with the owner of the ship, or with the master.

Q. And the only office with which you communicated was the office of Comyn, McCall & Co.?

A. Yes.

Redirect Examination.

Mr. OLSON.—Q. At any time since February 28th of this year, have the officers and the crew signed off the shipping articles before you?

A. You mean on this vessel?

Q. Yes, on this vessel, the vessel arriving here on or about February 28th of this year; have any of the officers or crew signed clear of the shipping articles before you? A. No, sir.

Mr. OLSON.—That is all.

Mr. FRANK.—Mr. Olson, Mr. Chidester, the receiver, is very anxious to get away, and I would like to accommodate him. It will be admitted, will it not, Mr. Olson, that a complaint was filed in the

(Testimony of Walter McArthur.)

United States District Court, entitled "Commonwealth [86] of Australia vs. Pacific Motorship Company et al.," on the 8th day of March, 1921, in Division 2, in Equity, asking for the appointment of a receiver of, among other vessels, the motor ship "Benowa"?

Mr. OLSON.—Yes.

Mr. FRANK.—And thereafter, that proceedings were had, and on the 26th day of March, 1921, an order was made granting the petition for a receiver, and appointing Drew Chidester as such receiver?

Mr. OLSON.—He was appointed on the 28th, I believe.

Mr. FRANK.—No, he was appointed on the 26th, and qualified on the 28th.

Mr. OLSON.—All right.

Mr. FRANK.—And on the 28th of March he qualified and took possession of the "Benowa," subject to the possession of the United States Marshall, until the further order of the Court; that is correct, is it not?

Mr. OLSON.—That is correct.

Mr. FRANK.—Now, I would like to call Mr. Chidester as a witness.

Testimony of Drew Chidester, in His Own Behalf.

DREW CHIDESTER, called in his own behalf, sworn.

Mr. FRANK.—Q. Mr. Chidester, you are the receiver of certain property of the Pacific Motorship Company? A. I am.

(Testimony of Drew Chidester.)

Q. And in charge of the motorship "Benowa" in the proceedings known as the Commonwealth of Australia vs. Pacific Motorship Company et al., now pending in the United States District Court, in Division 2? A. I am.

Q. And you are qualified as such receiver on the 28th of March, 1921? A. Yes, sir. [87]

Q. What did you do with respect to the motorship "Benowa" upon qualifying as such receiver?

A. The only action that was taken was to address a letter to the master of the ship, enclosing a notice to the crew, advising them that the "Benowa" was in my hands as receiver, and notifying them that their services were no longer required, and they were ordered to get off the ship.

Q. When was that notice given?

A. That notice was dictated and sent out on April 1, 1921.

Q. State whether or not there have been funds in your hands sufficient to pay the wages of the crew, or furnish the vessel supplies. A. No.

Q. Have there been any funds come to your hands?

A. A small amount, something in the neighborhood of \$2,000.

Q. When did that come to your hands?

A. Some time during the month of April.

Q. The latter part of April? A. Yes.

Q. And that has been received in the receivership proceedings, has it?

A. That money, of course, was not received on

(Testimony of Drew Chidester.)

account of the "Benowa"; that was received on account of the "Babinda."

Q. It has nothing to do with the "Benowa"?

A. No.

Q. It is in the general receivership funds, is it not, to be applied against all the claims?

A. That is in the discretion of the Court.

Q. In the discretion of the Court, and upon the order of the Court? A. Yes.

Q. What was your purpose, as such receiver, in respect to the discharge of the vessel from the custody of the marshal. Have you made any application to the Court about that?

A. There was an application made to the Court to discharge the ship from the custody of the marshal, and to place her under the receiver.

Q. I mean in respect to these claims.

A. I do not know as to [88] this particular claim, or under which claim the marshal has been placed on board.

Q. I will read you from your verified answer, and see if this does not refresh your memory as to that proceeding:

"It is the purpose of the receiver to ask the Court for the discharge of the vessel from the custody of the marshal and that the same be placed in the custody of the receiver, and that the claims of the libelants"—referring to the libelants in the present case—"after having been adjudicated as to their amounts, shall be transferred to the proceeding in equity"—re-

(Testimony of Drew Chidester.)

ferring to the action in which you are appointed receiver—"so that the same may be duly administered and marshalled by said Court and paid out of the proceeds which shall come into the possession of the said receiver under said receivership."

A. That refreshes my memory. There have been so many answers written that I did not remember that.

Q. Does that truly state your purpose?

A. Yes.

Q. And you made such an application to the Court, did you not? A. Yes.

Q. Have there been, at any time since the filing of the libel in this action, funds in your hands sufficient to satisfy those claims? A. No, sir.

Q. Have you ever refused to pay any of the claims? A. I never refused to pay them; no.

Q. Simply you have not had funds to do it?

A. I have not had the funds with which to do it.

Q. Have you had any examination made of the "Benowa" with regard to the necessity of pumping her out? A. No.

Q. Have you had anybody examine her on your behalf?

A. No, I have not. I had no funds, or no authority from the Court to employ [89] such help.

Cross-examination.

Mr. OLSON.—Q. When you sent that notice to Captain Renny, advising him that the crew was discharged, was there any offer accompanying that

(Testimony of Drew Chidester.)

notice to provide any wages or subsistence for the crew at that time? A. No.

Q. Did you, at any time since your appointment as receiver, make any attempt whatever to obtain funds to provide wages and subsistence for the crew of the "Benowa"? A. Yes.

Q. From whom did you make that attempt to get money?

A. From the parties to this suit, on both sides.

Mr. FRANK.—Q. You mean the equity proceeding in which you are the receiver, don't you?

A. Yes.

Mr. OLSON.—Q. And did you obtain any money? A. No.

Q. When did that \$2,000 come in which you have spoken of?

A. Some time during this month, the latter part of April.

Q. Did you make any effort or attempt to see that the crew of the "Benowa" got any portion of that money for subsistence, or for wages?

A. No.

Q. Have you paid any of the crews of any of the vessels any money on account since you were appointed receiver? A. No.

Q. When you sent that notice to the captain in regard to the discharge of the crew, did you send anyone to take care of the vessel, and to provide the proper lights and signals which are required under the navigation laws of the United States?

A. No.

(Testimony of Drew Chidester.)

Q. In other words, under the terms of your notice, was it intended that the crew should shift for themselves, and that the ship should lie there subject to the elements, or any other conditions which might arise?

A. Proper care would have been taken at the time should the necessity have arisen? [90]

Q. Did you do anything to see that such steps would be taken provided the crew had left the vessel? A. Yes, I had the necessary men ready.

Q. Did you have funds to pay those men?

A. No.

Q. Did you have any order of the Court permitting you to do that?

A. No; I didn't hire them, they were simply standing by in case they were needed.

Q. What provision had you made for paying these men?

A. I had made no provision whatever.

Q. Did you make any agreement to pay them any money? A. No.

Q. How long did those men stand by?

A. They were not standing by under wages; they were simply told that if this occurred they would be available; I wanted to have them here to take over the watching jobs on those ships.

Q. How many men did you have standing by?

A. I didn't have them standing by in the sense of being under wages.

Q. How many men did you have subject to your order to go on there in case you required them?

(Testimony of Drew Chidester.)

A. Any number that were needed.

Q. What qualifications did these men have?

A. Various seafaring experience.

Q. Were they men that were acquainted with motorships of the style of the motorship "Benowa"? A. Yes.

Q. Who were they?

A. I don't remember their names, exactly, now.

Q. Where did you find these men, or get into communication with them?

A. They came to me when they heard of the difficulty of the ships.

Q. Did they say anything to you about arrangements for any wages that they should receive?

A. No.

Q. Did you offer to pay them any specific amount? A. No. [91]

Q. How did they report to you?

A. They simply called on me in the course of the day's business, applying for the positions.

Q. Did you have their names and addresses?

A. Yes, sir.

Q. Do your records show them now?

A. I think I have them in the office, possibly.

Q. How many men's names and addresses, approximately, have you in your records at the office?

A. At least four.

Q. Do you know what the qualifications of those four men are?

A. Some of the men had had previous experience on these motorships, some of them had helped install

(Testimony of Drew Chidester.)

the engines originally in Seattle, and various experience of that nature.

Q. How soon after this notice was sent did these men report to you?

A. They reported prior to that time.

Q. And they were calling on you every day up to and including the 1st of April, were they?

A. I would not say every day, no, because that is begging the question.

Q. Had they been coming to you on and off up to the present time to see whether or not their services were required? A. Yes.

Q. How many of them have reported at your office?

A. I don't keep a tabulated list of them, or when they called, or the hours they called, or the days they called, Mr. Olson; they are looking for work.

Q. Have you, as receiver, paid any of the crew of the motorship "Cethana," since its arrival in the port of San Francisco? A. No.

Q. Have you since the date of your appointment as receiver made any application to the Court for permission to hypothecate any of the property which has come into your hands as receiver in order to obtain funds to pay the crew of the motorship "Benowa," or to provide subsistence for them?

A. No, I have not.

Q. Have you at any time attempted to obtain a loan from the bank as to this matter.

A. No. [92]

Q. Then the testimony which you have given rel-

(Testimony of Drew Chidester.)

ative to those men who have been coming to you seeking employment is the only thing which you have done relative to the care of the motorship "Benowa"?

A. No, I would not say that.

Q. What else have you done since your appointment as receiver?

A. There have been other matters, of course, that have been taken up, not necessarily looking to the physical care of the ship, but to the care of the whole situation.

Q. Have you done anything with reference to the physical care of this ship since your appointment as receiver? A. No, I have not.

Q. Have you, as receiver, relied upon anyone for taking care of the "Benowa"? A. No.

Q. Have you had knowledge that the master and the crew were on the ship during the time that you have been appointed receiver? A. Yes.

Q. And you have felt satisfied that they were taking proper care of this vessel?

A. Not necessarily, no.

Q. That is, you felt sufficiently satisfied so that you did not take any steps to have anyone look after the physical care of the vessel?

A. No, it was simply a matter of trying to arrange finances and the authority of the court to hire somebody else to do it. Had I been able to get that authority, they would have been off the ship, and she would have been under other care.

Q. Is that \$2,000 which you speak of which has come into your hands still in your possession?

(Testimony of Drew Chidester.)

A. It is in my possession, that is, it is in the bank.

Q. Can you say approximately how long you have had that in your possession?

A. Possibly a week or ten days.

Q. Have you ever asked your attorney to make application to the Court to permit you to provide any subsistence, or for the pay [93] of the wages of the officers and the crew of the "Benowa" out of this \$2,000? A. No.

Redirect Examination.

Mr. FRANK.—Q. Have you made any application to the court for further powers, Mr. Chidester?

A. Yes.

Q. And what were those powers that you have applied for? A. I don't remember exactly.

Q. Any powers to raise money to satisfy claims against the vessel?

A. I think that application has been made.

Q. You have made that application, haven't you?

A. I believe so. There was a long list of them we filed, or were about ready to file when the matter was held up on Monday, I believe, wasn't it?

Q. It was to be on hearing a week ago Monday, wasn't it? A. Yes.

Q. And what was the reason that it was not proceeded with?

A. The different parties in the suit apparently were getting together, and it was asked to have the matter continued until to-morrow, Saturday.

Q. For what purpose?

(Testimony of Drew Chidester.)

A. The settlement seemed to be very near at hand.

Q. The settlement of all claims?

A. Of the receivership under which I was appointed in equity, the Australian Government and the Pacific Freighters Company seemed to be getting near together on a settlement, and for that reason it was requested by the attorneys that the matter stand over until to-morrow.

Q. So that fact is, you have applied to the Court for permission to raise funds to satisfy claims against all the vessels in your charge, which includes the "Benowa": Is that so?

A. I do not know as to the raising of funds. The powers that were applied for were rather numerous. I would have to look into that matter and see whether it includes the raising of funds, or not. [94]

Q. Let me show you this, Mr. Chidester, and I call your attention to the last item.

A. That was the list that was given to Mr. Frank; whether or not that was incorporated in the powers that were asked for, I do not know. This is a memo of the powers that I thought were necessary for me to have to proceed with the receivership; whether that was incorporated in the application to the court, or not, I don't know.

Q. But you did take steps?

A. I submitted it to the attorney to ask for the necessary funds to pay off the crews and to negotiate for the releasing of about \$24,000 that was on hand in New York, which had been libeled by the Pacific Steam Navigation Company.

(Testimony of Drew Chidester.)

Q. And you do not recollect at present whether that request was included in the petition for certain powers now on file in the United States District Court?

A. No, I do not remember whether it was, or not. I have not the papers with me now.

Q. But you were making endeavors toward the payment of the crew of the vessel "Benowa," were you, to satisfy their claims?

A. Through trying to get the money released in New York, which was to be applied, as I understood it, to the payment of the "Benowa's" crew.

Q. Was it or was it not your purpose to get permission of the Court to satisfy those claims?

A. It was necessary to get the permission of the court, yes, and that was my purpose in doing that.

Q. Approximately, Mr. Chidester, what are the aggregate claims in the receivership proceedings?

Mr. OLSON.—I object to the question on the ground it is immaterial. A. I wish I knew.

Mr. FRANK.—Q. Can you give us some idea, Mr. Chidester? [95] A. Do you mean the total?

Q. Yes.

Mr. OLSON.—I make the same objection. I object to the question on the ground that we are not interested in the general receivership proceedings in this case.

A. Do I understand you to mean that to cover the libels, the unpaid bills, and—

Mr. FRANK.—Q. I mean all claims against the vessels, or against the Pacific Motorship Company,

(Testimony of Drew Chidester.)

or the Pacific Freighters Company, with relation to the properties in your charge?

Mr. OLSON.—I make the objection on the ground that the Pacific Freighters Company is not a party to this action, and that we are not interested in the general receivership proceedings.

Mr. SMITH.—In which action?

Mr. LILLICK.—This particular action.

A. The Pacific Motorship Company and the eight motor vessels that they have, have something in the neighborhood of \$500,000 outstanding claims against them.

Mr. FRANK.—Q. And about ten days ago you received that \$2,000 in the receivership proceedings and as such receiver? A. Yes.

Q. In regard to the four men whom you say had standing by, was that sufficient to care for the vessel while she was laid up—the “Benowa”?

A. Yes. There was only one real engineer necessary; the others could have been deck men, such as a quartermaster—probably one licensed officer. The beach is full of them to-day, you know; you would not have any trouble in getting men.

The COMMISSIONER.—Mr. Smith, inasmuch as you suggested [96] that a stipulation could be made in this matter, and inasmuch as Mr. Lillick is now present, let a stipulation be dictated, and if you can all agree upon it, it will end the matter.

Mr. OLSON.—Will it be stipulated that on the arrival of the vessel, demand was made upon the owners and operators of the motorship “Benowa” for one-

(Testimony of Drew Chidester.)

half of the wages due the officers and the crew at the time of its arrival?

Mr. SMITH.—Oh, no.

Mr. LILLICK.—All right, now, let us stop right here and go ahead with the testimony.

Mr. SMITH.—Now, wait a minute. He has said that this demand was made on the owners and operators. No such demand was ever made on the owners. I don't know who he means by the operators.

Mr. LILLICK.—Then we will have to prove it.

Mr. SMITH.—He can't prove it.

Mr. LILLICK.—We will see. You have laid down the gage of proof. Go ahead with the testimony.

Mr. FRANK.—Now, just a minute. We may save time. I think we can agree that the application for further powers, referred to by Mr. Chidester, which is on file in the records of this Court, that is, the United States District Court, in this proceeding may be considered as in evidence before the Commissioner?

Mr. OLSON.—Upon the condition that we have received no notice of the application.

Mr. FRANK.—You are not entitled to notice, but that is all right.

The COMMISSIONER.—If it is a fact, just let that appear; if it is not a fact, then, of course, that cannot appear.

Mr. FRANK.—All I want is to have the application considered [97] as read into this record.

(Testimony of Drew Chidester.)

Mr. OLSON.—There is no objection to that, except that we have had no notice of it, and it is not binding upon us.

Mr. SMITH.—Well, you don't give anybody else notice of your proceedings, I don't see why you should ask for any notice.

Mr. FRANK.—I think it might be well to have all the records in the receivership proceedings read into the record of this proceeding before the Commissioner.

Mr. LILLICK.—Without in any way admitting that they are binding upon us, and reserving always throughout this entire testimony the point that the officers and crew of the "Benowa," and the rights which we have attempted to obtain through the filing of this libel, are such that the appointment of the receiver, the receivership proceeding, all of the attempted authority exercised by the receiver was of no avail, so far as we were concerned, because at the time of the appointment of the receiver we already had a valid and existing lien upon the vessel, she was then in charge of the marshal under process issued in this case, and any of the proceedings that have been taken by the receiver, or by the parties interested, except those particularly entered and filed in the case in which this testimony is being taken, are outside the issues, are not binding upon us, nor in any way of such a character as to affect our rights.

Mr. FRANK.—Then, subject to that objection, will it be stipulated—

Mr. SMITH.—I won't make any such stipulation,

(Testimony of Drew Chidester.)

because Mr. Lillick's statement is contrary to the fact.

The COMMISSIONER.—This is not a stipulation; it is really a suggestion that this be the objection that is— [98]

Mr. SMITH.—Now, Commissioner Krull, the only way for us to do is to walk out to the Postoffice Building and offer in evidence these records, and let them make any objection they want, and then the records will be received.

Mr. FRANK.—It is intended that they shall be received in evidence; that is the purpose of this stipulation.

The COMMISSIONER.—You offer them in evidence?

Mr. FRANK.—Yes, and they are in the record subject to the objection made by Mr. Lillick.

The COMMISSIONER.—Yes, they are in for whatever purpose they may serve, subject to his objection. Let it stand that way. Now, proceed, Mr. Frank.

Mr. FRANK.—I have no further questions.

Mr. SMITH.—Q. Mr. Chidester, you testified that on April 1, 1921, you sent out a notice to the master of the "Benowa": How did you send that out?

A. It was sent by a messenger from my office. The captain had given me his address as being care of J. & R. Wilson, who are ship chandlers, and who are supplying the crew with provisions, as I understand it; he said that would be his headquarters. The note was sent down there by messenger, that is

(Testimony of **Drew Chidester.**)

to say, my instructions were given to that effect. I did not take the note down myself.

Q. Have you the messenger? Is he in your office now?

A. I don't know which man took it down there, or how it was delivered, but the captain admits that he got it.

Q. Admits that he got it when?

A. Well, that is another question.

Q. Has he made any admission to you?

The COMMISSIONER.—He has testified here, Mr. Smith, as I recall it—

Mr. SMITH.—I am asking this witness if the captain made [99] any admission to him as to the date when he got it.

A. The first notice of that was when I got a letter from him, I received a letter from him and one from Mr. Lillick.

Q. There was some discussssion in your testimony about some funds, \$2,000 received by you on account of the "Babinda"; I will ask you whether, as receiver in this equity suit, you ever received any other funds? A. No.

Q. I will ask you where the "Babinda" is?

A. The "Babinda" is at Pier 21.

Q. I will ask you whether there are any libels on the "Babinda"? A. Yes.

Q. Do you know who filed those libels?

Mr. OLSON.—I object to that as immaterial.

The COMMISSIONER.—Answer the question: The objection is noted.

(Testimony of Drew Chidester.)

A. It is a matter of record, Mr. Smith; I do not know.

Mr. SMITH.—Q. You have no knowledge of that?

A. No.

Q. You also testified about \$24,000 being in New York, which you say is libeled by the Pacific Steam Navigation Company.

Mr. FRANK.—You mean it is attached.

Mr. SMITH.—I understood the witness to say libeled.

A. Well, libeled or attached, whatever it is.

Q. I will ask you whether the Pacific Steam Navigation Company has filed any libels, or any attachment suits here in San Francisco against the Pacific Motorship Company and these other defendants?

A. Yes.

Q. Who is the proctor for the Pacific Steam Navigation Company? A. Mr. Goodfellow.

Q. You testified that claims against this property held under the receivership amounted to \$500,000; I will ask you if the [100] claim of the Commonwealth of Australia is included in that amount?

A. As far as I know, they have not set up any definite amount of claim.

Mr. FRANK.—We have introduced the receivership proceedings in this record, and the complaint will show the amount claimed.

Mr. SMITH.—I merely want to correct the witness in this: the complaint in the equity proceeding shows that the claim of the Commonwealth of Australia is \$1,625,000.

(Testimony of Drew Chidester.)

A. (Continuing.) I was referring more to unpaid bills and these small items. I don't know what the claim of the Australian Government amounted to.

Mr. SMITH.—That is all.

Mr. OLSON.—I have another question to ask—

Mr. SMITH.—Now, I object to any further examination by Mr. Olson. Mr. Olson has had the witness on cross-examination, and finished his cross-examination. This is not Mr. Olson's witness, and he is not entitled to any redirect examination.

Mr. LILLICK.—He is entitled to cross-examine the witness upon the redirect examination by Mr. Frank.

The COMMISSIONER.—Proceed.

Mr. OLSON.—Q. You testified, in answer to a question by Mr. Frank, that the liabilities, in your estimation, the liabilities of the Pacific Motorship Company, were in the sum of about \$500,000; do you know what the assets of the company are?

A. No, I do not. I only know what the accounts, as they stand to-day, would show.

Q. Do you know what the approximate value of all their property and assets is?

A. There is a difference in the assets and the liabilities, according to the books, of somewhere, in the neighborhood of \$125,000; that is to say, the excess of liabilities over assets. [101]

Mr. FRANK.—Q. When you say that the outstanding claims against the Pacific Motorship Company are about \$500,000, that is not an accurate statement, is it?

(Testimony of Drew Chidester.)

A. That is simply considering the small bills, and the libels, and things of that kind; it does not take into consideration the claim of the Australian Government at all; that is a separate matter entirely. It covers unpaid premiums, unpaid bills, crew's wages, and things of that kind.

Q. So, as a matter of fact, you have not definitely ascertained it?

A. No; you cannot ascertain it, apparently.

Q. All that you know is that they are \$125,000 in excess of the assets?

A. As of February 28th, yes, according to the books of the company.

Mr. OLSON.—Q. That is only an approximation, is it not? A. Yes.

Mr. FRANK.—Q. You have not had the opportunity of ascertaining that definitely yet, have you?

A. No, not until I get some accountants who are qualified to go in and certify the facts from the books. I have applied to the Court to have an examination of the accounts made.

Mr. OLSON.—Q. When you said that the liabilities exceeded the assets by \$125,000, do you include the claim of the Commonwealth of Australia in your figures?

A. I don't know whether that is included, or not.

Q. You don't know?

A. No. It is a matter of having the books audited in order to get down to the real situation. [102]

**Testimony of William C. Renny, for Libelants
Cross-examination (Resumed)**

WILLIAM C. RENNY, cross-examination (resumed).

Mr. SMITH.—Now, Mr. Olson, the captain, here, has testified that no advance of any kind had been made to these people; I have here a statement prepared and signed by the captain in which he shows that these advances were made. Will you stipulate that these advances, which I will read off and which are shown in this statement, were actually made, otherwise I will have to cross-examine the captain about this statement. The advances which are shown here correspond with my information, except in minor particulars; in general, they correspond; I think they are correct. My suggestion is that you just stipulate that these advances were made, and that I be allowed to read them off.

Mr. OLSON.—We will stipulate that those advances have been made.

Mr. SMITH.—Q. Captain, in your testimony you stated that certain advances had been made, and particularly an advance of \$100 that you testified was made to the first assistant engineer, and that no other advances had been made. Showing you this document, which is signed by you, I call your attention to a statement under a column headed “Advances,” and opposite the name “J. B. Hughes, first assistant engineer, \$101.55”; that is the amount to which you referred, isn’t it?

A. Yes, \$100 plus the cost of sending the money to his wife, which was \$1.55.

(Testimony of William C. Renny.)

Q. And that is the correct amount for which the owner of the ship should be credited? A. Yes.

Q. I call your attention to the fact that in the next column opposite that same name there is an item, "Slops, 20 cents"; [103] that is an advance, isn't it? A. We never called it an advance.

Q. But, nevertheless, it is a proper credit to the owner of the vessel?

A. Yes, it is a proper credit.

Q. On the same statement I show you, under the column, "Advances paid during the voyage," and opposite the name "Crawford," an item, \$66.67.

A. That was also paid by the General Agent in Norfolk, Va.; it was not paid by me at all. It is credited there to the owners. I may have omitted that in my statement about the \$100; I forgot all about that item.

Q. And in the same column, opposite the name "L. A. Carter, third assistant engineer," there is an item \$5.

A. That is the same thing; that was obtained from the special agent in Norfolk.

Q. And in the column headed "Slops," the following appear: "Third assistant engineer, \$6.05"; "W. E. Austin, electrician, \$11.61"; "A. Hobson, oiler, \$2.44"; "W. Ward, oiler, \$6.05"; "Charles V. Smith, wiper, \$12.99"; all those are proper credits? A. All those are for slops.

Q. And in the steward's department, and under the column "Slops," are the following: "Harry D. Wright, steward, 82 cents"; "Rober Daigle, \$7.15";

(Testimony of William C. Renny.)

“John Lopez, \$16.28”; “S. J. Ryan, \$3.92”; those also appear there? A. All for slops.

Q. In another statement which I show you, under the heading “Deck Department,” and under the column, “Charges, Slops,” the following appear: “R. J. Spencer, \$2.22”; “H. H. Cornell (Counsell) \$1.75”; “T. Harrigan, \$14.85”; “B. Johansen, \$3.02”; “Franklin Adrain, \$25.51”; “F. B. Shilling, 13.95”; “Axel H. Johnson, \$5.95”; “J. Lartimer, \$8”; those are all slops? A. All slops.

Q. And are proper credits to the owner of the vessel? A. Yes,

Q. In your direct examination you stated that here in San Francisco [104] you had made certain advances to the members of the crew?

A. Yes.

Q. Those are not included in this statement?

A. No, they are not, and they don't belong in there.

Q. In your direct examination you stated that you had demanded transportation for the crew: Did any member of the crew tell you that he wanted to go back east? A. Yes, all of them.

Q. Did they ask for a ticket?

A. No, they didn't ask for a ticket; they are not supposed to get a ticket; they are supposed to get transportation, as I understand it. They asked for transportation.

Q. Meaning money?

A. Meaning what the contract says: I suppose that means money.

Q. That is your construction of the contract, is it?

(Testimony of William C. Renny.)

A. Yes, that is my construction of the contract.

Mr. SMITH.—I move to strike that out as not responsive to the question.

Q. What they asked for was money?

A. They didn't ask for money; they used the phrase, or the term, "transportation"; they didn't ask for money; they asked for transportation. The money that was asked for was money that they were entitled to on the arrival of the ship at port, which was half of their wages when it was decided that this was to be the port of discharge.

Q. Did any of them tell you where they wanted transportation to?

A. No, they didn't tell me at all. The articles state "Transportation to Baltimore." I didn't care if they wanted to go to the devil. It was nothing to me where they went. The transportation called for was transportation to Baltimore. I don't care where they go to; I have no interest in it at all. The men are suing me for what is due them, and I am going to give [105] it to them if I possibly can.

Mr. SMITH.—I move to strike out as not responsive.

Q. In your direct examination you stated that various demands—

Mr. FRANK.—Q. You don't mean they are suing you. You mean that they filed a libel against the vessel.

A. They filed a libel against the vessel; yes.

Mr. SMITH.—Q. In your direct examination you stated that you had made various demands, and that

(Testimony of William C. Renny.)

members of the crew also had made demands on the owners of the vessel.

A. I don't believe I said anything of the sort, pardon me.

Q. What did you say?

A. I think you are kind of mixed up on that. Let this gentleman, here, read what I said; that is perfectly good enough for me. I will stand by what I said.

Q. Did you make any demands or requests?

A. I made, I should say, probably six or eight different requests for money.

Q. On whom were those request made?

A. On the folks that I was told were the operators of the ship.

Q. Who were they?

A. The Pacific Motorship Corporation, I think they call themselves, something like that, at 310 California street. And the request was made at 310 California street. Also a request in the presence of the Shipping Commissioner; you have already heard the Shipping Commissioner testify about that.

Q. And the man of whom the request was made there was Mr. Moran?

A. Yes. The other gentlemen refused to come; they didn't want to come; they were asked to come, but they didn't; they stayed home; I guess they wanted to wait for their lawyer.

Q. And that is all the request that you made, or

(Testimony of William C. Renny.)

that you know of anybody having made?

A. That is all that I know of. The ship's crew might have been up there a dozen times without my [106] knowing it.

Redirect Examination.

Mr. OLSON.—Q. Captain, after your arrival at San Francisco, was a demand made upon you by the crew for one-half of the wages due them at that time?

A. Yes, but not each individual member of the crew; the boatswain came as representing the crew; I think each of the engineers made a request.

Q. Did you have any funds belonging to the vessel, or the owners of the vessel, in your possession?

A. No, sir.

Mr. SMITH.—I object to that as not redirect examination; I didn't cross-examine the witness about any funds that he had.

Mr. OLSON.—Q. How soon after you arrived at San Francisco did you make a demand upon the owners or the operators of the vessel for funds to pay the crew?

A. I think I made the first request the day after we arrived here; that would be probably about the 2nd of March.

Q. Where did you make that demand?

A. At 310 California street.

Q. At what office?

A. The Pacific Motorship Company.

Q. Do you recall who you saw there? Who did you ask for? A. I asked for Mr. Ringwood.

Q. What position did he occupy in the office?

(Testimony of William C. Renny.)

A. I understand that he was the operator, or the manager, probably, of the company.

Mr. SMITH.—I move to strike out what the witness understands as being his conclusion.

A. (Continuing.) Ringwood signed his name to any letters I received from that company, as president, I think.

Mr. SMITH.—I move to strike that out as hearsay. Agency cannot be proved by mere declaration.

Mr. OLSON.—Q. Were you referred to anyone at that time? [107]

A. No. Mr. Baird spoke to me several times on this money proposition; Mr. Baird, I think, is one of the accountants for the Pacific Motorship Company.

Q. And you made many demands after that time, did you?

A. No, not many; my demands might have been made half a dozen times for money for the crew and for myself.

Recross-examination.

Mr. FRANK.—Q. The demands that you say were made for wages, you don't know who of the crew made such demands—some of them may have made them and some may not have made them: Is that it?

A. The fact remains that they were all asking for their wages. There was not one who came and volunteered to leave the ship without his money—I will tell you that much.

Q. But as to a request upon you for wages, you

(Testimony of William C. Renny.)

do not know who made it?

A. I will say that the whole ship's company demanded their wages; they all demanded their wages.

Q. Is that the fact?

A. That is the absolute fact, so help me God!

Q. Who did they make the demand of?

A. They made the demand of me.

Q. When?

A. I can't tell you exactly when. They have made their demands for wages probably twenty times.

Q. Sometime this month?

A. Some of the times this month and some of the times last month.

Mr. SMITH.—Q. Captain, what is your disposition in this case, are you kindly disposed toward the owners of this vessel?

Mr. LILLICK.—That is objected to as immaterial, irrelevant and incompetent, and I instruct the witness not to answer.

Mr. SMITH.—Mr. Lillick, if you want to instruct the witness not to answer, I know that he will obey you. The result of that [108] will be that this matter will have to be called before the Court, or else the commissioner brought down to direct the witness to answer.

Mr. LILLICK.—You have your rights, and know them, and I think I know mine.

Mr. SMITH.—Q. Do you refuse to answer, Captain?

A. I have not said anything. My attorney is guiding me in this case.

(Testimony of William C. Renny.)

Q. Mr. Lillick is your attorney?

A. Yes, Mr. Lillick is my attorney.

Q. Are you suing the owner of the ship?

Mr. OLSON.—I object to that as immaterial, and instruct him not to answer.

Mr. SMITH.—Q. In what matter is Mr. Lillick your attorney?

Mr. OLSON.—I object to that.

A. Because I think I am not bright enough myself, probably, to thresh this all out before you legal luminaries, and I had to employ Mr. Lillick to help me.

Mr. SMITH.—Q. Help you to do what?

A. Help me listen to you.

Q. With all due deference, Captain, you are not listening to me, though I am asking you questions.

A. Well, that is what I employed Mr. Lillick for.

Mr. FRANK.—Q. You are not a libelant in this case, are you, Captain?

A. I am not a libelant in this case, no, sir, I am a defendant in this case.

Mr. SMITH.—Q. Have you also filed a libel?

Mr. OLSON.—I object to that as immaterial.

Mr. LILLICK.—And the record is the best evidence.

Mr. SMITH.—Q. Do you refuse to answer that?

[109] A. I have not refused anything.

Q. Well, do you?

A. My attorney told me not to answer that question.

Q. Do you refuse?

(Testimony of **William C. Renny.**)

A. I have not refused. I will tell the man anything I can.

Mr. LILLICK.—We are wasting so much time, and this record is getting pretty long; every word that is taken down is costing somebody some money; it is not costing my clients any. The records show the captain has filed a libel on his own behalf, independently of the libel that has been filed for the crew. I will stipulate that a libel has been filed by Captain Renny against the vessel for the recovery of the amount that he claims to be due him.

Mr. SMITH.—Will you stipulate also that Captain Renny is actively interested in the prosecution of this particular libel of the crew?

Mr. LILLICK.—It is not a fact that the captain is actively interested in the prosecution of this libel for the crew; it is a fact that the captain was put on the stand to testify to certain facts as he understood them. His sympathies, perhaps, may be interesting him in doing what he can to bring out before the Court the facts, so that whoever may be responsible for the present condition and situation may hereafter be held liable for it.

Mr. SMITH.—Will you stipulate that the captain is strongly biased against the claimants in this case, and strongly biased in favor of the crew, and in particular in favor of the present demand which the crew is pressing?

Mr. LILLICK.—If it could be said that a man who is acting in an independent position can be biased, and with a knowledge [110] that the mem-

(Testimony of William C. Renny.)

bers of this crew were left destitute in San Francisco, some of them with families at home—

Mr. FRANK.—Mr. Lillick, please do not testify.

Mr. LILLICK.—I am not testifying; I am answering the remarks that were made by Mr. Smith, and he can be making them but for one purpose, and I have a right to answer as I am. The captain's sympathies may be going where they will because of this condition that, as I say, was brought about so that the crew were left here destitute, without any means for their provision, and the captain, in common humanity, endeavored to do what he could—for I know it myself—in obtaining sustenance for them. Perhaps the captain's own testimony would be best as to which way his sympathies lie.

Mr. SMITH.—I move to strike out all that Mr. Lillick has said, as a mere *ex parte* statement.

Mr. FRANK.—It is not a matter of sympathy at all; it is simply the question whether a certain amount of money is due this crew. That question is before the court.

Mr. SMITH.—I think I have a right to ask Captain Renny these questions, and we will appear before the commissioner, whenever the commissioner is available, and we will ask the captain to answer the questions, and if he does not answer them, we will ask to have him committed for contempt.

Mr. LILLICK.—I have instructed the captain not to answer certain questions; I have not instructed him not to answer whether he is biased.

Mr. SMITH.—Q. Captain, have you a bias?

(Testimony of William C. Renny.)

A. I have absolutely no bias; I am simply acting as the master of the ship in this case. Some unknown owners are also cited to appear, I don't know who the dickens they are, nobody has told me who [111] the owners are; you have tried two or three times to-day to prove that the folks I have spoken to are not the owners, you have said so yourself; I don't know who the owners are; I am acting as master of the ship. These men have asked me for their money: I have not the money, I have to get the money through the court, or through the owners of the ship.

Mr. FRANK.—Q. All we want to know, Captain, is what is due the crew.

A. What is due the crew is there in that paper, plus the extra days since this was drawn up. Also, in order to help Mr. Smith, I may tell him I have sold a few more chews of tobacco, or, rather, the wireless operator does that, he does all the selling, I don't see the darn thing myself; there are a few more chews of tobacco to the credit of the owners, whoever they are. Those matters will be accounted for. I want nothing from the owners but what is right. I have nothing against the owners at all.

Mr. SMITH.—Q. You say, Captain, that in addition to the slops shown on this statement I have exhibited to you, there are other slops charged against the libelants?

A. There are other tobacco supplies.

Q. Can you furnish a statement of those charges?

Mr. OLSON.—Those are subsequent to this state-

(Testimony of William C. Renny.)

ment you have already shown him.

Mr. SMITH.—That doesn't matter. If these men have been taking the property of the owners of the vessel, they should account for it.

Mr. LILLICK.—Surely. We will give them whatever credit they are entitled to and furnish a definite statement of it.

A. We can give you a statement of that at any time.

Mr. SMITH.—Can you give it to us now?

A. We have to make [112] out a full statement of the pay due to the men, to be added to this.

Q. That is another matter; the Court will decide that.

A. The Court will also decide whether I have to make up this statement, too. We are not trying to do the owners out of anything. Q. Nor are the owners trying to do you out of anything.

A. Well, they haven't come forward and said they would pay me anything yet. And while we are talking about this, this is a sort of a talk outside of court—

Mr. LILLICK.—No, Captain, it is not. Every word is going down in the record.

A. I might tell you that I am in a worse condition myself, so far as pay is concerned. I took this ship in September, 1920, and I haven't got a settlement yet.

Mr. SMITH.—Mr. Lillick; will you furnish a statement of those further charges?

The WITNESS.—Here they are, right here.

(Testimony of William C. Renny.)

They are right up to date; those can be put in.

Mr. SMITH.—That can be copied in the record.

Mr. LILLICK.—We will get the dates, so that the statement will be complete.

(By consent, a recess was here taken until two-thirty o'clock P. M.) [113]

AFTERNOON SESSION.

Mr. OLSON.—Will you stipulate that S. J. Wright, which appears in our libel, is S. J. Ryan?

Mr. FRANK.—Yes.

Mr. OLSON.—Are you going to stipulate to that, Mr. Smith?

Mr. SMITH.—As I told you before, I am not in a position to make a stipulation of that kind.

Mr. OLSON.—You are not a party to the record, anyhow.

Mr. SMITH.—If you want to make the motion in court you can make it, but I cannot make such a stipulation.

Mr. LILLICK.—May I ask, Mr. Smith, why you are not in a position to stipulate that?

Mr. SMITH.—I made the statement this morning, Mr. Lillick, as to our position in the matter. We do not want to discommode you, but I do not understand that this proceeding is held for the purpose of amending the libel. This proceeding is for the purpose of stipulating as to certain facts, and taking certain testimony, under the order of the Court, and that is what we are directed by the Court to do. We have been here to stipulate as to the facts, and we

(Testimony of William C. Renny.)

have been anxious to stipulate to the facts all morning, and at this rate we will be here all afternoon, but I do not undersstand that this is the proper place for amending the libel in any way.

Mr. LILLICK.—This morning, when you made a similar offer, I had not finished a sentence, as I remember it, before you said you would not enter into such a stipulation.

Mr. SMITH.—Because you asked me to stipulate, not as to facts, but as to a conclusion of law, whether notice had been given to the owner of the ship. I said the owner was a corporation, and I will stipulate that demand was made upon individuals, [114] if you would name them, but further than that I cannot go. The captain's testimony shows that Mr. Ringwood is the operator of the ship; what an operator is, I don't know. He said he had some conversation about Mr. Ringwood. I take it he is telling the truth about that, but we cannot stipulate as to the conclusion, that that is binding upon the owner of the ship.

I object to any further taking of testimony, if you are going to abandon this libel and file a new libel; I do not think these proceedings are of any avail at the present time, Mr. Lillick.

Mr. OLSON.—The question is as to whether or not it will be stipulated that the demands were made by each of the members of the crew upon the master for one-half of the wages due them at the time

(Testimony of William C. Renny.)

they arrived at the port of San Francisco. Will that be stipulated to?

Mr. FRANK.—The master has so testified, and I know nothing one way or the other.

Mr. OLSON.—Will it be stipulated that each member of the crew would so testified if he were called?

Mr. FRANK.—I don't know about it. I think you are sufficiently protected by the testimony of the captain. I have no further testimony to offer.

Mr. SMITH.—I don't want to stipulate beyond what the captain has testified to.

Mr. LILLICK.—We will take the testimony, then.

Testimony of R. J. Spencer, for Libelant.

R. J. SPENCER, called for the libelant, sworn.

Mr. OLSON.—Q. What position did you occupy with the motor ship "Benowa"?

A. First mate. [115]

Q. When did you sign on as first mate?

A. January 21, 1921.

Q. Mr. Spencer I call your attention to this log-book of the motorship "Benowa" from Baltimore, and particularly to the entries made in the log-book from the 27th day of February, 1921, to and including the 28th day of April, 1921, and will ask you whether or not this is your writing.

Mr. SMITH.—Just a moment. I object to the witness being interrogated as to a document when the document is not shown to opposing counsel.

Mr. OLSON.—Q. I will ask you if this is the

(Testimony of R. J. Spencer.)

log-book of the motorship "Benowa"? A. Yes.

Mr. SMITH.—I object to this question because the document is not shown to opposing counsel. (Thereupon counsel is handed the log-book.) Common courtesy calls for that.

Mr. OLSON.—We certainly have not received any from you.

Mr. SMITH.—I object to that.

Mr. LILLICK.—Let us have everything that goes on of record.

Mr. FRANK.—Do you want to refresh his memory from that?

Mr. OLSON.—I am going to put everything in that log and in the engineer's log in the record from February 28th.

Mr. SMITH.—Have you seen this log, Mr. Frank?

Mr. FRANK.—No, I have not seen it. What is the purpose of that, Mr. Olson?

Mr. OLSON.—To show what the members' of the crew relations have been with the vessel since that date.

Mr. SMITH.—Are you going to read every one of these entries?

Mr. OLSON.—Unless you stipulate it.

Mr. SMITH.—I do not think they are evidence at all.

Mr. FRANK.—He can refresh his memory from them. If you want to use them for that, all right; otherwise, we will have [116] to object to the introduction.

(Testimony of R. J. Spencer.)

Mr. OLSON.—All right. We will have to read them in first.

Q. Mr. Spencer, I call your attention to the log of the motorship "Benowa," dated February 28, 1921, and will ask you if that is your signature?

A. Yes.

Q. In reference to the entries in this log-book, can you tell me in whose handwriting this is?

A. That is my writing.

Q. Did you make these entries on that date?

A. Yes.

Q. Can you testify, refreshing your memory from the entries made on that date, as to what was done on that date? A. Yes.

Q. Will you do so?

Mr. SMITH.—I object to this line of testimony on the ground that you have not shown the witness has any knowledge of these facts other than what he is reading from the book, and on the further ground that it is not shown that he requires the book in order to refresh his recollection.

Mr. OLSON.—Go ahead.

A. This was the day we arrived in San Francisco; at 1:10 A. M. we anchored in San Francisco Bay and laid there until the morning; the doctor came alongside for the usual doctor's inspection. Nothing out of the ordinary happened during the rest of the day.

Q. I will ask you as to the date of March 1, 1921, and ask you if this is your signature? A. Yes.

Q. Will you state, after refreshing your recol-

(Testimony of R. J. Spencer.)

lection from the entries there, what was done on the vessel on that day?

Mr. SMITH.—I object to that on the same grounds, and on the further ground that it does not appear that the witness has to refresh his recollection.

A. Ordinary routine work aboard the vessel.

Mr. OLSON.—Q. Were the crew employed on that day?

A. Yes; [117] the crew were employed rigging cargo gear, painting, etc.

Mr. SMITH.—You are still testifying from the book? A. And from my memory.

Mr. OLSON.—Q. On March 2, what took place?

A. Very much the same as the previous day.

Mr. SMITH.—I object to this on the ground that it does not appear that the entries on this date were made by the witness, or when they were made, and on the grounds heretofore stated. I do not want to keep repeating this objection, Mr. Olson. Will you stipulate it applies to all this line of testimony?

Mr. OLSON.—I will stipulate to that.

Q. Will you state what was done on March 2d?

A. I just have.

Q. On March 3d, will you state what was done?

A. Painting the ship's hull, and various other duties about the ship. The regular watches were stood right through; that includes all the previous days.

Q. On March 4th, what was done?

(Testimony of R. J. Spencer.)

A. The regular routine work aboard the ship, and keeping watches.

Q. On March 5, 1921, what was done?

A. Cleaning the decks, and other routine work and watches.

Q. On March 6th what was done?

A. Routine work and watches. I beg your pardon. March 6th was Sunday. There were the routine watches.

Q. On March 7th what was done?

A. March 7th, routine work and watches.

Q. There is a note there, "Awaiting orders." What do you mean by "awaiting orders"?

A. We were out there awaiting orders. As I understood it, we put into this port in distress, and were awaiting orders.

Q. On March 8th, what was done?

A. Routine work on watches. [118]

Q. On March 9th what was done?

A. On March 9th there was regular routine, and the representatives of the crew, with the captain, went to the shipping commissioner to apply for food and their pay on account of not having food; we understood that the pay was due us, and we went to the commissioner to get some sort of an answer, and the commissioner sent for a representative of the owners, and the testimony that the commissioner gave this morning will cover the rest of that day.

Q. Were you present in the commissioner's office at that time? A. Yes.

Q. And you heard commissioner Walter Mac-

(Testimony of R. J. Spencer.)

Arthur's testimony this morning, did you?

A. Yes.

Q. As far as your recollection serves you, is that testimony correct, as to your recollection of what took place on that date? A. Yes.

Q. That was on March 9th of this year, was it?

A. Yes.

Q. What took place on March 10th?

A. Routine work on watches.

Q. On March 11th, what took place?

A. Routine work on watches.

Q. On March 12th what was done?

A. At 4:10 A. M. tugs alongside to bring ship to discharging berth at California City.

Q. On March 13th what was done?

A. March 13th, no work, Sunday, excepting watches.

Q. On March 14th what was done?

A. Cargo discharged and crew standing by to assist in preparing the different parts of the ship for discharging cargo.

Q. On March 15th what was done?

A. The same as on March 14th, including watches.

Q. What is this entry here?

A. This day—this was March 15th—the entire crew signed a contract to employ a lawyer to procure their wages and other moneys due them from the Pacific Motorship Company, Ira S. Lillick, San Francisco attorney. [119]

Mr. SMITH.—I object to that, and move to strike it out, on the ground it is secondary evidence of the

(Testimony of R. J. Spencer.)

contents of a written instrument, and I call for the production of the contract.

Mr. OLSON.—Q. On March 16th what was done?

A. Routine work on watches.

Q. There is an entry there, “Resumed discharging.” What does that mean?

A. Cargo. The crew signed an agreement to pay for the food supplied them to the party supplying them out of their subsistence or wages that they might receive from the ship.

Mr. SMITH.—I move to strike that out for the same reason, and call for the production of that document.

Mr. OLSON.—Q. On March 17th, what was done? A. Routine work on watches.

Q. What about the cargo on that date?

A. Finished discharging the cargo on March 17th.

Q. March 18th, what was done?

A. Tugs moved ship from berth to the stream, to anchorage.

Q. Whereabouts did they move the vessel to at that time? A. Down off Mission Rock.

Q. Do you know under whose orders the vessel was moved? A. No.

Q. On March 19th what was done?

A. Routine work on watches.

Q. On March 20th what was done?

A. Regular sea watches; no routine work, on account of being Sunday.

Q. On March 21st what was done?

A. Routine work and watches.

(Testimony of R. J. Spencer.)

Q. On March 22d what was done?

A. Routine work and watches. I would like to state, this routine work includes cleaning up of the ship and various other ship's work, necessary daily.

Q. On March 23d what was done?

A. Routine work and watches.

Q. On March 24th?

A. Routine work and watches.

Mr. SMITH.—Mr. Olson, why don't you stipulate that this [120] witness will read that same entry every day for the rest of the time.

Mr. OLSON.—There are some different entries in here, and we tried to stipulate, but evidently were unable to do so, so we will read the entire record, unless it can be stipulated to.

Mr. SMITH.—My suggestion is in order to save time you simply stipulate that these entries will be read in that way, or the witness may be deemed to have read them in that way, except those particular ones to which you wish to call attention.

Mr. OLSON.—He has also testified as to facts, refreshed by entries in the log-book.

Mr. SMITH.—I am simply suggesting that in order to avoid this consumption of time. We have only got two weeks now, and you have got a long ways to go in that book. Let us stipulate that all the other pages will read the same way, except the ones that you want to call attention to.

Mr. OLSON.—If we can stipulate to the effect that Mr. Spencer will testify as to these facts, and, knowing them of his own knowledge, and refresh-

(Testimony of R. J. Spencer.)

ing his recollection by these entries made in this log-book, then we will stipulate as to the entries being read into the record.

Mr. SMITH.—I don't understand the language you use.

Mr. OLSON.—We will read it and have it understood, then.

(The record was read by the reporter.)

Mr. SMITH.—You say, stipulate that Mr. Spencer will testify as to these facts, and knowing them of his own knowledge. What does the conjunction "and" connect with? I cannot understand that sentence. I may be very dense.

Mr. OLSON.—The purpose is to stipulate that Mr. Spencer knows of his own knowledge of the various matters which constitute the entries in this log-book, and refreshing his memory by [121] reading these entries, that he testifies that those various matters took place in accordance with the entries made in the log-book.

Mr. SMITH.—If he knows them, he does not have to refresh his recollection. That stipulation does not make sense. I do not want to delay this thing, He has already testified as to his state of mind in regard to knowledge of these facts, and the effect of the reading of the log-book on his state of mind. Now, I am willing to stipulate that that same testimony which he gave heretofore shall apply to every one of these pages.

Mr. OLSON.—We will put it in right through, then, in view of the fact that a stipulation cannot be entered into.

(Testimony of R. J. Spencer.)

Mr. SMITH.—A stipulation can be entered into. We will stipulate to exactly what Mr. Spencer testifies to.

Mr. OLSON.—Will you stipulate that he will testify that he knows of all of these facts of his own knowledge, and that he can, by refreshing his memory from the entries made in this log-book?

Mr. SMITH.—I will say that that language that you use is to me contradictory, and I cannot stipulate to that, but I will stipulate that whatever Mr. Spencer said about this thing will apply to all these entries.

Mr. OLSON.—We will put them in in our own way, then.

Q. Mr. Spencer, what took place on March 25th?

A. On March 25th, routine work and watches.

Q. On March 26th what took place?

A. Routine work and watches

Q. On March 27th what took place?

A. Watches; no routine work, on account of Sunday.

Q. On March 28th what took place?

A. The smokestack caught fire; no damage done. Employed in regular routine work and watches.

Q. Was there a fire there on that day?

A. Yes. [122]

Q. Was it put out? A. It was put out.

Q. Who was it put out by.

A. Put out by the ship's crew.

Q. On March 29th what was done?

A. Routine work and watches.

(Testimony of R. J. Spencer.)

Q. On March 30th what took place?

A. Routine work and watches.

Q. On March 31st?

A. Routine work and watches.

Q. On April 1st?

A. Filled the ballast tanks, and routine work and watches.

Q. Anything else? A. No.

Q. On April 2d, what was done?

A. Routine work and watches.

Q. There is a note there, "Marshal's custodian aboard." Do you know how long he had been aboard?

A. He came aboard March 12th.

Q. The marshal's custodian appeared March 12th?

A. Yes.

Q. April 3, what was done?

A. No routine work, on account of Sunday; watches.

Q. April 4th?

A. Routine work and watches.

Q. On April 5th?

A. Routine work and watches.

Q. April 6th?

A. Smokestack caught afire; put out by ship's crew, no damage done; routine work and watches. Filled amidships water ballast tank.

Q. April 7th?

A. Routine work and watches. Captain read and posted a notice to the crew stating that the services were no longer required, and inviting them to get

(Testimony of R. J. Spencer.)

out of the ship without any pay.

Q. What else?

A. Notice was signed by the receiver of the Pacific Motorship Company.

Q. April 8th? A. Routine work and watches.

Q. April 9th? A. Routine work and watches.

Q. April 10th?

A. No routine work, on account of Sunday; regular watches.

Q. April 11th? A. Routine work and watches.

[123]

Q. April 12th? A. Routine work and watches.

Q. April 13th? A. Routine work and watches.

Q. April 14th?

A. Smokestack afire, put out by crew, but no damage done; routine work and watches.

Q. April 15th? A. Routine work and watches.

Q. April 16th? A. Routine work and watches.

Q. April 17th?

A. No routine work, on account of Sunday, but regular watches.

Q. April 18th? A. Routine work and watches.

Q. April 19th? A. Routine work and watches.

Q. April 20th? A. Routine work and watches.

Q. April 21st? A. Routine work and watches.

Q. April 22d? A. Routine work and watches.

Q. April 23d? A. Routine work and watches.

Q. April 24th?

A. No routine work, on account of Sunday; regular watches.

Q. April 25th? A. Routine work and watches.

(Testimony of R. J. Spencer.)

Q. April 26th?

A. Anchor veered to 75 fathoms; routine work and watches.

Q. Do you know why the anchor was veered to 75 fathoms on the windlass?

A. In testing out the engines at full speed we considered it necessary.

Q. By whose orders was that done?

A. The order of the mates on watch.

Q. April 27th? A. Routine work and watches.

Q. April 28th A. Routine work and watches.

Q. Do you know whether or not there were any members of the crew on board to-day?

A. Yes, there is.

Q. Is there a regular watch on at the present time? A. There is.

Mr. SMITH.—I object to that. This witness does not know what is happening on the ship at the present time. [124]

Mr. OLSON.—Q. You have spoken of routine work through there. What do you mean by "routine work"?

Mr. SMITH.—I would like the record to show the witness is now testifying apart from the book.

A. By "routine work," we have a boat that we bring ashore to get the men that come ashore; as part of the routine work we have to clean the ship, keep it in shape; the cooks had to cook, and the kitchen has to be kept ship-shape, and it requires a certain amount of work daily by the crew.

Mr. OLSON.—Q. Did you have anything to do

(Testimony of R. J. Spencer.)

with the engineering department of the vessel?

A. No.

Q. Mr. Spencer, can you state whether or not you made any demands for your wages and subsistence other than what you have already testified to?

A. Yes, I can.

Q. Will you state on what occasions and to whom those demands were made?

A. On several occasions I made demands to the captain for wages which were due me, and transportation and other money due me. He told me that he had not any money on each one of those occasions, but I do not recall the exact dates.

Q. Approximately between what dates were they, to the best of your recollection?

A. Somewhere around March 9th was the one, I am sure.

Q. Have you made demands subsequent to that time? A. Yes.

Q. Did you ever call at the office of the Pacific Motorship Company?

A. I called there for my mail.

Mr. OLSON.—That is all.

Cross-examination.

Mr. FRANK.—Q. You never made any demand for wages on Mr. Drew Chidester, the receiver of the vessels owned by the Pacific Motorship Company?

A. I never made demand on him.

Q. On the receiver, Mr. Drew Chidester?

A. No. [125]

Q. Nor his attorneys? A. No.

(Testimony of R. J. Spencer.)

Q. Is it not a fact, Mr. Spencer, that this routine work you spoke of can be performed by from two to four men? It does not require the whole crew, does it? The vessel is laid up, practically, isn't she?

A. No. We are on active duty out there, and we have the whole crew that has to be looked out for, and food and shelter there, and we have to do certain things.

Q. You are looking out for the crew—that is the routine work in a large part, is it not?

A. The ship has to be kept clean. The ship has to be cleaned out after the cargo is taken out. The cargo made it very dirty.

Q. How long did it take you to do that?

A. We are still working on some of it.

Q. From March 17th to the 29th of April,, cleaning the ship? A. Yes.

Q. How long does it usually take after a vessel discharges to clean her up?

A. It depends on the cargo.

Q. You can say.

A. It depends on the cargo and the number in the crew.

Q. Approximately, you can do it in a day or two, can't you?

A. We have a short crew, and we are just about finished cleaning her out.

Q. I say, ordinarily, it takes about two days to do that, doesn't it? You do not mean to say it has been necessary to clean the vessel up for a period

(Testimony of R. J. Spencer.)

of over a month, as a result of the discharge of that cargo? You do not mean that?

A. We were laying at anchor and we had to have night watches.

Q. You have not answered me.

A. Ordinarily, it does not.

Q. No, it does not. Ordinarily, how long does it take? A. Two or three days.

Q. I thought so. Now, as a matter of fact, the crew had no [126] place to go, because they were without funds; they were living on board the vessel, were they? A. Yes.

Q. They were making that their home, weren't they? A. Yes.

Q. This going to and from the vessel was the same as going to and from their homes—between the shore and the vessel—was it not? A. Yes.

Q. That was about the routine work that continued after the receiver had notified them that their services were not required further, wasn't it?

A. Yes,

Q. Now, in the entries in your log, there is no mention made of the vessel being in danger of sinking, or anything like that, is there? A. No.

Q. She was not in any danger of sinking, was she? A. No.

Q. If she had been, there would be an entry in the log? That is a very important matter, isn't it?

A. Yes.

Q. In fact, there was no danger to the vessel, was there?

(Testimony of R. J. Spencer.)

A. There was danger on one or two occasions when she caught fire.

Q. That is all, isn't it?

A. That is all the immediate danger, yes.

Q. How did she happen to catch fire—turning the engines over?

A. No, the smokestack caught fire.

Q. How did it catch fire?

A. There was some accumulation in the smokestack, or soot, that burned.

Q. But she is not a coal or oil burner, she is a motorship, isn't she? A. Yes.

Q. Where did the fire come from?

A. From carbon, I think, in the smokestack.

Q. Just a little smouldering, is that it?

A. It is a blaze, it comes out of the stack; it is a wooden ship, and it would not do to neglect the blaze. [127]

Q. After the date of her discharge, neither you nor any of the crew remained on board at anybody's particular request? You were staying on board, there, weren't you, without any particular request?

A. Yes. We were staying aboard waiting for our wages; we had no place to go.

Mr. FRANK.—I think that is all.

Mr. SMITH.—These fires in the smokestack, what caused them?

A. They were caused by carbon, I think, the accumulation in the smokestack.

Q. It does not ignite itself, does it?

(Testimony of R. J. Spencer.)

A. It ignites, yes, not of itself, but that it what it has done.

Q. Doesn't it have to have some heat to be set afire? A. The engines have heat.

Q. The engines were going when that started—that is what started them, I suppose?

A. That was the only visible cause that I can see.

Q. Were the engines going at the time of this fire? A. The auxiliary engines were going.

Q. For what purpose?

Mr. OLSON.—If you know.

A. For the purpose of running the auxiliary machinery.

Mr. SMITH.—What auxiliary machinery do you mean? A. The ice-box, the dynamo.

Q. Do you know what the ice-box and dynamo were run for?

A. Do I know what they were run for?

Q. Yes.

A. The ice-box is usually run to keep something cool.

Q. For the crew? A. To keep food cool.

Q. For the crew? A. Yes, in this case.

Q. And the dynamo was to provide lights for the crew? A. Lights for the ship.

Q. You have read out of this log about a contract with a lawyer. [128] Have you that contract?

A. I have a copy of it on board the ship.

Mr. SMITH.—I do not want to ask this witness to produce that. I suppose you have a copy of it here.

(Testimony of R. J. Spencer.)

Mr. LILLICK.—I have a duplicate original here.

Mr. SMITH.—Will you produce it?

Mr. LILLICK.—I will not. You perhaps know, Mr. Smith, that it is irrelevant to the issues here. We are suing for the wages of the crew; we are not suing for the compensation that the attorney expects to obtain for representing the crew.

Mr. SMITH.—It is not immaterial here. You are not suing for wages, you are suing for a penalty.

Mr. LILLICK.—All right.

Mr. SMITH.—We have offered to pay these men their wages. You, on their behalf, have refused to accept it; the only reason that you gave being that you wanted the penalty. Now, under the circumstances, where you are going in seeking to enforce a penalty and the sole ground for the penalty is whether refusal is without sufficient cause, I insist that this contract is material and should be produced, and I am going to demand that it be produced, as soon as the commissioner gets here. Further than that, you, yourself, have offered testimony in regard to this contract, and, under those circumstances, you have made it a part of the case, and I insist upon the production of that contract.

Mr. LILLICK.—In so far as your statement is concerned that I have demanded the penalty, when the subject came up first, as I recollect it, the offer was made by—

Mr. SMITH.—Are you testifying, Mr. Lillick?

Mr. LILLICK.—(Continuing.) Mr. Gerber. You know very well, [129] Mr. Smith, that I am

(Testimony of R. J. Spencer.)

not testifying, and that I am answering your remark. If you wish to conduct this in an orderly way, and go on in an orderly way, it is a matter, of course, for you to pass upon, in your judgment, as to how you should conduct the case. The penalty part of it, which you referred to, come up, as I remember it, after an offer had been made by Mr. Gerber—whether it came through your office or otherwise to me, I do not know—that the crew should be paid their straight wages up to the date of the filing of the libel, and no longer, and I told either you, or whoever it was who brought the subject up first, that the crew had been advised apart from any advice that I had given them, that they were entitled to double pay from the time they first made their demand for the amount to which they were entitled when the vessel came into port, and that, so far as I was concerned, my hands were tied in attempting to effect any settlement with you on that particular point, because the crew were fixed in their determination to have that matter passed upon by the Court; that it had been sued for in the libel, and that, without their consent, I could not waive that demand made by me on their behalf. It came up most recently, I think yesterday, when a part of the crew were here in this office, and a telephone message ensued between you and me, and this same point came up, and Mr. Austin, who was here with a note from the members of the crew, authorizing him to speak for them, refused to permit me to even consider accepting an offer which you had

(Testimony of R. J. Spencer.)

made that the amount of their wages up to, as I remember it, the 7th of March, amounting to \$5,000 and some odd, be accepted, and the question as to their rights to recover double pay from the date of the filing of the libel be left to the discretion of the Court. Now, without any disrespect to you, or without any feeling [130] upon my part, I will not in any way abide by any such order as you may be able to obtain from the Commissioner, I will until ordered to do so by the Court refuse to produce a copy of the contract which you have asked for.

Mr. SMITH.—I move to strike out this statement as not properly a part of the record.

Q. You also testified, Mr. Spencer, about a contract which you made with the persons from whom you got certain provisions. Have you that contract? A. No, I have not.

Mr. SMITH.—Have you that, Mr. Lillick?

Mr. LILLICK.—My recollection of that contract is that—

Mr. SMITH.—I ask you if you have the contract.

Mr. LILLICK.—Mr. Smith, you will have to adopt a different tone toward me, if you are going to get along with me. My recollection of that contract is that J. & R. Wilson, through the captain, said that they were willing to furnish such necessary subsistence as would enable the crew to get along, if he, the captain, through me, could undertake to pay J. & R. Wilson out of such money as might be allowed by the Court, the amount of the

(Testimony of R. J. Spencer.)

bills that might be incurred by the crew for their subsistence, and that arrangement was made with J. & R. Wilson. I don't know whether it is in the form of a letter, or whether it is something that occurred through the captain having passed on to me this information. I know I did telephone to some one in J. & R. Wilson's Co.'s office and told him over the phone that I would see that that would be done.

Mr. SMITH.—Now, Mr. Lillick, I move to strike that out as an attempt by you to volunteer a statement orally as to the contents of a written instrument as to which I am interrogating the witness. And I make this further objection, that you have [131] several times stated that Mr. Gerber would have to pay the cost of his record, and that, therefore, you would do everything you could to make the record as long as possible. I insist that this is a statement made by you purely voluntarily, made over my objection, and an attempt by you to run up the cost of this hearing, which you hope ultimately to impose upon Mr. Gerber, and I must protest against the continuance of these tactics which have been followed by you during the course of the hearing.

Mr. LILLICK.—With full knowledge upon my part of the gravity of the statement I am about to make, I wish to say that the remark you have just made that I said that Mr. Gerber would have to pay the cost of this record, and, therefore, I would do everything I could to make the record as long as

(Testimony of R. J. Spencer.)

possible, and you insist is a statement made by me purely voluntarily, made over your objection, and an attempt by me to run up the cost of this hearing, which I hope ultimately to impose upon Mr. Gerber—in so far as the part of that commencing with that I would do everything I could to make the record as long as possible, that is absolutely untrue. I not only did not say that, but I have had no intention during any part of the conduct of this case to add anything whatever to its cost, and the language that you have used in connection with it has no support, so far as I know, except a side remark that I made a few minutes ago when an altercation ensued between you and Mr. Olson as to the introduction of certain testimony under stipulation, that that altercation probably cost a dollar and a half.

Mr. SMITH.—Q. Who has this contract, Mr. Spencer? A. Mr. Wilson.

Q. Do you know his name and address?

A. J. R. Wilson & Company.

Q. What is his address?

A. On Steuart Street, I don't know [132] the number—127 Steuart Street.

Mr. SMITH.—If you telephone you can get that, Mr. Lillick.

Mr. LILLICK.—Mr. Smith, I am taking no suggestions from you at all.

Mr. SMITH.—I will ask that a subpoena be issued directed to Mr. Wilson, commanding him to bring with him this document. I will renew that as soon as the Commissioner comes.

(Testimony of R. J. Spencer.)

Q. Calling your attention to page 2 of his log-book, I will ask you whether that is in your handwriting. A. Yes.

Q. I call your attention to page 43, and ask you whether that is in your handwriting? A. Yes.

Q. I call your attention to page 83 and ask you whether that is in your handwriting.

A. No. That is not my signature at the bottom.

Q. Page 73, I ask you whether that is in your handwriting? A. Yes.

Q. Then the fact is that the entries from March 16 to and including April 28th, were not made by you? A. Some were, and some were not.

Q. Point out which of those entries during that period were made by you. A. From this page on.

Q. From March 16th on?

A. March 16th was not.

Q. Point out which ones were, to save time.

A. I have made several corrections in this other man's work in keeping my log. Here is one, on March 23d. April 7th, I think some of these figures in the soundings are mine; I am not sure, exactly, which ones, because the figures look a lot alike. There are some more. Parts of April 24th, parts of April 25th, April 26th, April 27th, and April 28th, are in my handwriting, a part of each.

Q. For instance, referring to April 28th, what part of April 28th is in your handwriting?

A. Soundings. [133]

Q. The words "Dry," "2 inches," "Dry"?

A. Yes.

(Testimony of R. J. Spencer.)

Q. And on these other dates, from April 24th, the soundings are what you refer to as having been made by you?

A. As to some, I refer to the soundings, and some I refer to other things.

Q. In the entries of April 24th, 25th, 26th, 27th and 28th, is there anything in your handwriting except the soundings?

A. From April 24th, there is nothing but the soundings in my handwriting, and my signature.

Q. In whose handwriting are these entries?

A. Some of them are in the third mate's, and some of them are a seaman's.

Q. You spoke of somebody having copied this.

A. Yes.

Q. Who copied it?

A. I copied some, the third mates copied some, and a seaman copied some.

Q. What did he copy them from?

A. He copied them from the deck log, kept in pencil.

Q. When were these copies made?

A. Usually made each day; sometimes they run two days or three days.

Q. These entries commencing March 17th, when were they copied in?

A. Commencing March 17th, they were copied in yesterday, but they were copied from the rough log aboard the ship.

Mr. SMITH.—I move to strike out the whole testimony of this witness based on his purported re-

(Testimony of R. J. Spencer.)

freshing of his recollection from this log covering the period from March 17th on.

A. (Continuing.) And written by the watch officer.

Mr. SMITH.—That is all.

Redirect Examination.

Mr. OLSON.—Q. Mr. Spencer, you spoke about the machinery being run for the purpose of keeping the ice-box cool and also lighting the ship. Were there any other reasons for running the machinery?

A. Yes, for pumping the bilges. [134]

Q. What do you mean by pumping the bilges?

A. I mean pumping the water out of the ship that has leaked into it through the seams in the vessel, and any way it might get in.

Q. Do you have any recollection as to how much water came in through the seams of the vessel?

A. At what time?

Q. During the time between the 1st of March and the present time.

A. No, I have not. It is pumped out as fast as it comes in.

Q. Could you say whether or not there would be any danger to the vessel if the bilges were not pumped out? A. I think there would be.

Q. What danger would there be, in your opinion?

A. The danger of the vessel foundering, if they were never pumped.

Q. Mr. Spencer, you have gone over the various entries in the log from March 1 to the present time. Can you state, independently of the entries made in

(Testimony of R. J. Spencer.)

this log, from your own knowledge, whether those various incidents took place on board the motor ship "Benowa"?

Mr. SMITH.—I object to that as leading and suggestive, and not proper redirect examination.

A. Yes.

Mr. OLSON.—I will ask that this log-book be introduced in evidence and marked Libelant's Exhibit "B," and particularly the entries from March 1, 1921, to and including April 28, 1921.

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent, and self-serving declarations of the crew and of this witness.

(The log is marked Libelant's Exhibit "B.")

Mr. OLSON.—Q. Mr. Spencer, I will ask you whether or not all of the facts which you have testified to are during the present year, that is, all of these dates are from March 1, 1921, [135] to April 28, 1921? A. They are.

Mr. OLSON.—It is hereby stipulated and agreed that the entries in the log-book from March 1, 1921, to and including April 28, 1921, and signed by W. S. Austin, J. B. Hughes, and L. A. Carter are entries which were made in the engineer's log-book on the respective dates, and that if called upon to testify each of these men would testify that the remarks entered in the log actually took place on board the vessel.

Mr. SMITH.—Yes; except we want to cross-examine these men as to these entries.

Mr. OLSON.—That is all right. Mr. Hughes is

(Testimony of R. J. Spencer.)

not here to-day, though. Mr. Austin and Mr. Carter are here. They have made apparently most of these entries.

Mr. SMITH.—That stipulation is all right as far as Mr. Austin and Mr. Carter are concerned, who we are to be allowed to cross-examine to-day; but as to Mr. Hughes, we do not want to make the stipulation until we are allowed to cross-examine him.

Mr. OLSON.—Mr. Hughes will be here to-morrow, or when we proceed with the hearing.

Mr. SMITH.—All right.

Testimony of W. S. Austin, for Libelants.

W. S. AUSTIN, called for the libelants, sworn.

Mr. OLSON.—Q. What position did you occupy on the motor-ship "Benowa"?

A. Second assistant engineer.

Q. And you have held that position since January 21st of this year, have you? A. Yes.

Q. In the engineer's log-book I notice that your name is signed to a number of the entries, on the dates between March 1, 1921, up to the present time, and I will ask you if you made those [136] entries opposite where your name appears?

A. Not in all cases. In some cases they were made at my orders, and I, in signing my name, took the responsibility of those entries.

Q. Do you know whether those various matters contained in the remarks actually took place on the vessel?

A. As to the remarks I know—as to the ice-

(Testimony of W. S. Austin.)

machine pressures, for one hour there might be a slight variation, when I might not have taken them down, but as a rule it is all correct.

Q. Can you state generally what was done by the engineering department from March 1, 1921, up to the present day?

A. Yes. All this time the auxiliaries had been running, furnishing electricity, which runs the other auxiliaries, namely, bilge pumps, fuel-transfer pumps, fresh-water pumps, circulating water to the engines, water to the deck for the purpose of washing the deck, and putting out or preventing fires, turning over the main engines to see that the valves did not stick, to see that they were in as good condition as we could keep them, to do any work we thought necessary to protect the property of the vessel or the crew of the vessel. These routine duties were usually oiling the engines, running the ice-machines, making minor repairs, keeping the whole engine-room in a condition to protect the vessel against fire or other accident.

Q. Can you state approximately how often the bilges were pumped out?

A. They were pumped out—I can say approximately—sometimes every watch, which is every four hours; sometimes it is not necessary to pump them out more than once or twice a day, but so far as I know they have been pumped out every day at least once.

Q. The “Benowa” is a wooden vessel, is it not?

A. Yes.

(Testimony of W. S. Austin.)

Q. Do you know, from your experience, whether or not all wooden [137] ships take in more or less water?

A. I know by this particular vessel that prior to these articles the ship leaked as much as 17 inches of water an hour.

Mr. FRANK.—Q. What do you mean by prior to these articles?

A. Prior to these articles.

Q. Prior to this voyage? A. Yes.

Q. Were you on her at the time? A. Yes.

Mr. OLSON.—Q. Can you say how much water she has taken in during the time that she has been anchored off of Mission Rock, at the port of San Francisco?

A. The log will show the soundings at various times; it shows in the engine-room from 2 to perhaps 8 inches a day, and other holds in proportion. The forepeak hold did not take in enough water to make any note of.

Q. In your opinion, would there be any danger to the vessel if the bilges were not pumped out, in the present condition as she is lying here off Mission Rock?

A. I should think in a short while the water would rise to a position which would not enable any of the auxiliaries to work, particularly the fresh-water tanks, fuel pumps, and bilge and fire pumps, which are on the engine-room deck.

Q. You have mentioned oiling the machinery, and turning the engines in different remarks in this log-

(Testimony of W. S. Austin.)

book. Can you state whether it is necessary, for the preservation of the machinery of this vessel, to oil it and turn the engines?

A. If these engines were not oiled or were not turned, in a short time the valves and all other workable machinery would become rusted or stock, and it would necessitate a general overhauling if this were not done; they are kept in a position so that they might be started if the necessity should arise.

Q. Can you state generally anything which the engineering department [138] on the "Benowa" has done for the preservation of the machinery of the vessel, other than what you have already testified to, confining your testimony to the dates between March 1 and the present time.

A. We have ground valves, or reseated valves on the high-pressure air lines; we have opened the crank case of the auxiliaries for inspection. I think that is all in addition to what I have already stated.

Q. Were you present with the captain or any other officers or members of the crew of this vessel when demands were made at the office of the Pacific Motorship Company for wages? A. No.

Mr. OLSON.—I think that is all.

Cross-examination.

Mr. FRANK.—Q. It did not require the entire crew of the vessel to perform these things that you have described as routine duties, did it, Mr. Austin?

A. It would have required—

Q. (Intg.) Did it, I am asking you.

(Testimony of W. S. Austin.)

A. The men were kept employed—

Q. (Intg.) Is it necessary, I say.

A. Perhaps less men could have taken care of the machinery.

Mr. OLSON.—Q. Mr. Austin, when you refer to the number of men, do you refer to the Engineering Department, or the whole ship?

A. The Engineering Department, alone.

Mr. FRANK.—The deck crew had nothing to do with your Engineering Department? A. No.

Q. And it would take less of the Engineering Department to take care of the vessel's engines—that is all you did, isn't it? A. That is all.

Q. About a man who was acquainted with engines of that character, and somebody to assist him, could have performed those duties, couldn't he?

A. There must be at least one licensed engineer [139] aboard at all times.

Q. The vessel was practically laid up, was she not? She had no cargo in her, she was laying up, anchored, had no orders, or anything.

A. The only thing that was not done was that we were not running under our power; all the other work was the same as though we had been under our power.

Q. But with the vessel laid up as she was, all that was necessary to do was to turn the engines over every so often; isn't that so?

A. Run the auxiliary engines.

Q. You ran the auxiliaries because you had a crew on board, didn't you?

(Testimony of W. S. Austin.)

A. How would the bilges have been pumped if we had not been running the engines?

Q. Well, after all, with the vessel laid up as she was, it only requires a very few men to care for them—the caretakers could have done the same work, with the exception of an engineer to look out for the engines; isn't that the fact?

A. Yes, a very few could take care of it, and a very few are taking care of it.

Q. The whole crew are taking care of it, are they not? A. A very few.

Q. You mean to say the entire crew did not take care of it?

A. The entire engine-room crew of this vessel, being a Diesel ship, is at a very low scale, compared with any other vessel.

Q. How many of them are there?

A. The full crew on this voyage was the chief engineer, first assistant, second assistant, third assistant, the electrician, three oilers, and one wiper.

Q. You did not require all of those men to attend to the vessel in her condition, laid up as she was, did you?

A. No, less could have performed the duties.

Q. Now, as far as the leakage of the vessel is concerned, that [140] is usual with any vessel, any wooden vessel, isn't it?

A. It is usual, but with this vessel I think more—

Q. (Intg.) She perhaps leaked a little bit more?

A. Perhaps a little more.

Q. It is customary to pump out the bilges every

(Testimony of W. S. Austin.)

so often, isn't it? A. Yes.

Q. By the way, you heard the testimony this morning of Mr. Spencer, the first mate, that the crew were making the vessel their home. The engine-room crew, just as the deck crew, were making the vessel their home; isn't that the fact?

A. Yes, for the reason that we had no other place to go other than to ask for aid from the San Francisco charities, because we were not paid our due wages.

Mr. FRANK.—That is all.

Mr. SMITH.—That is all.

The COMMISSIONER.—Is there anything you wish from me now?

Mr. SMITH.—There is a contract dated, I think, March 21, 1921, between J. R. Wilson & Co., and the members of this crew, and I want a *subpoena duces tecum* issued to one of the members of that firm to produce the contract. There is also a contract in the office of Mr. Lillick, between him and the members of the crew, as to which some evidence has been introduced, and I want you to direct Mr. Lillick to produce that document.

The COMMISSIONER.—Is there any objection to there being produced here, Mr. Olson?

Mr. OLSON.—Yes, there is an objection to that.

Mr. SMITH.—Mr. Lillick has said that no matter who commands him he will not produce them.

The COMMISSIONER.—I won't be in a position to demand them. You make the demand for them, and if they are not produced, [141] that

(Testimony of W. S. Austin.)

portion of the record which sets forth the fact that they were asked for and refused can be certified to the court, and the Court can make such order on that certificate as it may be advised.

Mr. OLSON.—The record shows that if the Court ordered it produced it would be produced, but otherwise not.

The COMMISSIONER.—Now, that stands in that way. Is there any objection to the *subpoenas duces tecum*?

Mr. OLSON.—There is an objection upon the ground that it is immaterial; it has nothing to do with the allegations, or the issues of the present suit.

The COMMISSIONER.—Then would you direct disobedience of a subpoena that might be issued by virtue of the fact that this reference has been made to me, and perhaps under the reference I might have power or assume the power to issue a *subpoena duces tecum* for any books or papers that would be considered relevant by counsel for the respondent, or counsel in any way interested in the litigation?

Mr. OLSON.—Yes, we would desire to have the matter referred to the Court.

The COMMISSIONER.—Then a certificate will be made upon both of these questions, setting forth the facts as here stated by counsel for one of the parties. If you desire to have the matter taken before the judge in the morning you can have a certificate.

(Testimony of W. S. Austin.)

Mr. FRANK.—I have not called for them, myself.

The COMMISSIONER.—I have reference to Mr. Smith and Mr. Olson's position in reference to the documents that have been called for.

Mr. SMITH.—I will ask for such certificate.

The COMMISSIONER.—A certificate can be prepared on those [142] two questions.

Testimony of L. A. Carter, for Libelants.

L. A. CARTER, called for the libelants, sworn.

Mr. OLSON.—Q. Mr. Carter, what position have you occupied with the motorship "Benowa" since January 21, 1921, if any?

A. Third assistant engineer.

Q. Have you heard the testimony given by Mr. Austin with reference to the remarks in the engineer's log-book and as to the routine work of the engineering department on the motorship "Benowa," between the dates of March 1, 1921, and the present time? A. Yes.

Q. Do you know from your own knowledge as to the facts that Mr. Austin has testified to?

A. Yes.

Q. And if called upon to testify, is there anything that you would add to the remarks that Mr. Austin has made? A. How do you mean?

Q. Are there any remarks or incidents which you would add to the statements made by Mr. Austin?

A. A few minor remarks.

Q. Will you state what they are?

(Testimony of L. A. Carter.)

A. Well, this gentleman here (referring to Mr. Frank) is under the impression that the ship is laid up; it is not; it is still at sea; it is anchored. We had received no notice until the 7th of April, or the 8th, to get off of her. We take it the ship is still at sea.

Q. Are there any other statements which Mr. Austin made that from your own knowledge are incorrect, or as to which he might be mistaken?

A. No.

Q. Your duties in the engineering department are very similar to those of Mr. Austin, are they not? A. Yes.

Q. You each take turns on different watches, do you? A. Yes.

Mr. OLSON.—I think that is all. [143]

Cross-examination.

Mr. FRANK.—The vessel, however, is lying idle, isn't she, Mr. Carter?

A. Yes. She is not at a dock.

Q. She is lying idle at anchor, isn't she? No cargo in her, she is disengaged?

A. There is no cargo in her, but we have received no notice the ship was laid up.

Q. That is the qualification that you wish to make? A. Just what I have said; yes.

Mr. FRANK.—That is all.

Mr. SMITH.—Q. The duties which have been performed on the "Benowa" by the engineering department are the same duties, and performed in the same way as if the vessel were at sea; is that it?

A. Yes.

**Testimony of W. C. Renny, for Libelants
(Recalled).**

WM. C. RENNY, recalled for libelant.

Mr. OLSON.—Q. Have you ever received any notice from anyone representing the the steamship “Benowa”—either the owners or the receiver, to lay up the vessel?

A. No. At no time was the ship laid up. She is not laid up now.

Q. Will you explain what you mean by the vessel being laid up?

A. A vessel is simply laid up when the owners or receivers instruct the master to lay her up, that she is no longer to be in commission. I have received no such instructions, and I would be committing a crime if I was to lay that ship up without notice. I have to keep the full crew aboard that ship until I am ordered to discharge the men and have the money to discharge them with; according to law, they can serve that notice on me, and within four hours supply me with the money. They have never done it. The ship is still at sea, as far as I know. I am still [144] master of the ship, and the crew are still on her, from the fact that they have never received their wages, and have not been notified that they would receive their wages. There is no notice, we have never been told we would receive our wages until Mr. Smith said he would put the money into court; we didn't know it was put in court, and we don't know now that it is in court. We have only got his word for it.

Mr. SMITH.—Were you not present Wednesday

(Testimony of W. C. Renny.)

afternoon in the office of Commissioner Krull when I said we would pay this money to you?

A. You said you would pay the money in, but you did not say you had done it that afternoon.

Q. I spoke about paying it to the Court, didn't I?

A. No, you did not; I beg your pardon.

Q. Were you present in court when I made the statement to your proctor that we had the money there and would pay it?

A. You said that you would pay the crew up to the 7th—well, some day, the 7th or 17th of the month; that you would pay that into court, but you did not say you had paid it into court. You said that to-day.

Mr. SMITH.—Now, Mr. Olson, will you stipulate that I offered to pay this money to the crew?

Mr. LILLICK.—What money?

Mr. SMITH.—The wages up to and including March 17th.

Mr. OLSON.—I will stipulate that you made an offer which is similar to the written tender which you served upon this office upon Wednesday, but I do not know whether that is the exact amount of wages claimed by the crew to be due to the 17th of March. I have not figured it out.

Mr. SMITH.—I will say that it is the same amount, with the exception that Captain Renny shows slightly more slops than the [145] amount that we used as the basis of the computation.

The WITNESS.—Those slops were subsequent to the 17th of March. They have received tobacco to

(Testimony of W. C. Renny.)

make cigarettes right along. They got some tobacco yesterday.

Mr. SMITH.—Without wanting to enter into an altercation, there is a very slight discrepancy in the slops prior to the 17th of March.

Mr. OLSON.—I do not think there is anything worth arguing about.

Mr. FRANK.—Q. The vessel is lying idle, and she has been lying idle since the date of her discharge? A. She has been absolutely idle.

Q. You make the distinction between being laid up—your distinction is, you claim to have received no notice of discharge?

A. I received no notice, I was awaiting orders.

Q. But she is unoccupied, lying idle?

A. I don't know whether she is unoccupied, or not. They might have told me to sail in fifteen minutes.

Q. She has not now any cargo, she is not engaged in loading or discharging, she is absolutely empty, lying idle, is she not?

A. That happens at any stage of the game.

Q. That is all I want to know.

A. That ship, according to law, is at sea; she is not laid up, and she has not been laid up a minute.

Q. All I want is, she is not working cargo, she is not doing anything, she is lying at anchor?

A. Exactly, yes; lying at anchor, and probably will lay at anchor a while longer; nevertheless, I was never told by anybody that the ship was to lay at anchor for any definite time.

(Testimony of W. C. Renny.)

Mr. SMITH.—Q. How much money did you draw at Panama from [146] the agents?

A. I didn't draw any.

Q. Or at Colon? A. I did not draw any.

Q. Or at Cristobal? A. I did not draw any.

Q. Or at any ports of Panama?

A. I did not draw any.

Mr. OLSON.—Q. Captain Renny, did you make any demand on the Pacific Motorship Company at their offices at 310 California Street, and also through the United States Commissioner at the port of San Francisco for wages due to the officers and crew of the motorship "Benowa" for the voyage commencing at Baltimore upon January 21, 1921?

A. Yes.

Q. Will you state approximately when and how often demands were made by you?

A. I think the first demand was made about the 2d or maybe the 3d of March for money to give the crew, part, or half of their wages.

Q. When was the next demand made?

A. I should say probably the following day, or the day after, not later.

Q. When was the next demand made?

A. Probably the following day again,

Q. How often after that, do you recall?

A. Well, I do not recall. The next time that the men asked for money I arranged that they go with me to the Shipping Commissioner. I told them I was up against it, as the operating company would give me no money, and I had no money to give

(Testimony of W. C. Renny.)

them, and we had better go to the Shipping Commissioner, as he was our appeal, and we went there, as he settles all matters between the master and the crew of the ship. I let the men do their own talking. I explained the situation to the Shipping Commissioner, that they had asked for the money from me, and I could not give it to them, because the operating company would not supply me with funds.

Mr. OLSON.—Will it be stipulated that these demands made [147] by the captain and the representatives of the crew were made at the request of and on behalf of various members of the crew, without requiring each individual member being sworn and testifying as to the fact?

Mr. FRANK.—Are you satisfied that is the fact, Mr. Olson?

Mr. OLSON.—Yes.

Mr. FRANK.—If you are, all right.

Mr. SMITH.—I will take your word for it.

Mr. OLSON.—That stipulation will be entered into, will it?

Mr. SMITH.—I take your word for it.

Mr. OLSON.—I will offer these engineer's log-books in evidence, and ask that they be marked Libelants' Exhibits "C-1" and "C-2."

Mr. SMITH.—Let the objection be entered that they are self-serving declarations, immaterial, irrelevant and incompetent, and we can go ahead.

(The engineer's log-books are marked Libelants' Exhibits "C-1" and "C-2.")

(Testimony of W. C. Renny.)

Mr. OLSON.—I will ask that sections 4529 and 4530 of the Revised Statutes of the United States be considered as introduced in evidence and read into the record.

Mr. SMITH.—Q. At the office of the Pacific Motorship Company, whom did you see?

A. I saw, first of all, Mr. Ringwood, I believe—I first spoke to him about money.

Q. What did you say? Did he tell you to go and see Moran?

A. He told me he had only called in here in distress, that the crew, on that account—this was before the ship had been switched from Bremerton to California City for discharge—that the crew had no right to demand any money, and that until it was decided where the ship was to discharge her cargo, they [148] had no right to demand their wages.

Q. That was all your conversation with Mr. Ringwood? A. That was all at that time.

Q. Did you have any other conversation with Mr. Ringwood?

A. No. I tried two or three times to get a conversation with him, but I was not able to.

Q. All your conversations were with Mr. Moran?

A. No. I had several conversations with Mr. Baird.

Q. What did you say to him regarding funds?

A. To pay the crew?

Q. What did you say to him?

A. I cannot remember just in so many words what I did say to him. I told him that the crew

(Testimony of W. C. Renny.)

required and demanded money, that I had none, and I asked him if he could give me some.

Q. What I mean is, when you were talking to him, were you asking for half wages or full wages?

A. I was asking for half wages.

Q. Every time? A. Every time.

Q. When you talked to Mr. Moran, what did you ask for?

A. Well, I talked to Mr. Moran mostly about stores. I don't think I ever asked for any money from Mr. Moran.

Q. Until you saw him down at the office of the Shipping Commissioner?

A. Down at the office of the Shipping Commissioner was where the money proposition was put up to Mr. Moran. On that occasion, I do not think I addressed Mr. Moran, but the shipping commissioner did it.

Q. That was a request?

A. That was a request for full pay.

Mr. FRANK.—Q. The up-shot of the whole thing was that they told you they were absolutely without funds or credit, and that was the reason they could not pay? A. That was the reason.

Mr. OLSON.—Q. When you received orders regarding the vessel [149] during the voyage and previous to coming to San Francisco, who did you receive the orders from?

A. I received the orders from Ringwood.

Q. How were the orders or letters signed?

A. Signed by Ringwood; I don't know his initials

(Testimony of W. C. Renny.)

—by something Ringwood, President, I believe, or general manager of the Pacific Motorship Company, or vice-president, it might have been; I would not say for sure about that. He signed himself as some kind of a president.

(An adjournment was here taken until Monday, May 2, 1921, at 9:00 o'clock A. M.) [150]

Tuesday, May 10, 1921.

Testimony of R. J. Ringwood, for Respondent.

R. J. RINGWOOD, called for the respondent, sworn.

Mr. SMITH.—Q. Did you have any conversation with Captain Renny about the wages of the crew of the “Benowa”? A. Not to my recollection.

Mr. SMITH.—That is all.

Cross-examination.

Mr. OLSON.—Q. Mr. Ringwood, do you remember having any conversations at all with Captain Renny since the arrival of the motorship “Benowa” in the port of San Francisco?

A. Yes, I did have one or two conversations with Captain Renny.

Mr. OLSON.—That is all.

[Endorsed]: Filed May 9, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [151]

MONDAY, MAY 2, 1921.

(It is hereby stipulated that Mr. J. B. Hughes, if called, would give the same testimony that Mr. L. A. Carter gave, and that he would identify his signature, and would testify that he has knowledge of the entries made in the engineer's log-book from March 1st until the present time, and would testify that those entries in the engineer's log-book are correct.)

Mr. OLSON.—That closes our case.

Testimony of J. P. Moran, for Respondent.

J. P. MORAN, recalled for respondent.

Mr. SMITH.—Q. What is your name?

A. J. P. Moran.

Q. How old are you? A. 56, past.

Q. Where do you live? A. No. 12 Marcilly Street.

Q. What is your business?

A. Purchasing agent, Pacific Motorship Company.

Q. Since the appointment of a receiver for the Pacific Motorship Company, have you been acting under the direction of the receiver? A. Yes.

Q. How many vessels in charge of this receiver are in the Bay at the present time.

Mr. OLSON.—I object to that question as immaterial. A. Three.

Mr. SMITH.—Q. What are the vessels?

A. The "Benowa," the "Cethano" and "Babinda."

Q. Where is the "Babinda"? A. Pier 21.

Q. Who is on board of her?

(Testimony of J. P. Moran.)

A. The chief engineer of our company.

Q. Who else? A. The Marshal.

Q. Is the chief engineer capable of taking care of the ship? A. Yes. [152]

Q. How long has he been on there alone?

Mr. OLSON.—I want to enter an objection to this line of testimony upon the ground that we are not concerned with the “Babinda.” This is an action for the wages of the crew of the “Benowa.”

A. Since the 5th of March.

Mr. SMITH.—Q. I will ask you whether or not the “Babinda” is a sister ship of the “Benowa”?

A. She is.

Q. Were you here Friday? A. Yes.

Q. Did you hear the testimony of the various officers and crew of the “Benowa” in regard to the necessity of their having a crew on board of her to take care of her? A. Yes.

Q. In your opinion, is it necessary to have anybody more on board of the “Babinda” than you have on board of her? A. No.

Q. In your opinion, would it be necessary to have any more people on the “Benowa” than you have on the “Babinda”? A. No.

Q. What is the condition of the “Cethano”?

A. First class.

Q. Where is she? A. Pier 21.

Q. How many men are on board of her?

A. Marshal and chief engineer.

Q. How long have they been there alone?

A. Since about the 5th of March.

(Testimony of J. P. Moran.)

Q. Did you, acting on behalf of the Pacific Motorship Company, and also on behalf of the receiver, have anybody available to take charge of the "Benowa" if the crew had left her? A. Yes.

Q. Who?

Q. Our chief engineer and a watchman.

Q. In your opinion, is that all that was necessary?

A. Yes, that was all that was necessary.

Q. You heard Captain Renny's testimony in regard to having demanded money from you to pay the crew? A. Yes.

Q. What have you to say as to the correctness of that testimony?

A. He did not demand anything from me. [153]

Q. Nothing? A. No.

Q. I will ask you whether any provisions were supplied to the "Benowa" by you? A. Yes.

Q. What provisions?

A. What were required when he first entered port, and another time about five days after.

Q. I hand you this document, and ask you whether that refreshes your recollection at all as to the provisions that were required and furnished.

A. Oh, yes.

Q. What provisions were required and furnished February 28th?

A. 1 sack of sugar, 1 case of milk, 1 sack of potatoes, and some eggs that the captain got himself.

Q. I show you this document, and ask you whether that refreshes your recollection as to the provisions required and furnished March 5th. A. Yes.

(Testimony of J. P. Moran.)

Q. What provisions were required, if any, on March 5th?

A. 25 pounds loin pork, 15 pounds frankfurters, 6 head of cabbage, 15 pounds of dried onions, and 12 heads of lettuce.

Q. How were those provisions furnished?

A. Delivered to the launch company and sent aboard the ship.

Q. By whom? A. I ordered them.

Q. Of whom?

A. The groceries from West, Elliott & Gordon, and the meat from the Ferry Market.

Q. Were any other provisions required on board of the "Benowa"?

A. No. The captain gave me that requisition on the 28th of February, and I filled it, and the requisition on March 5th.

Q. Were there any provisions on board the "Benowa" after she got in other than those that were furnished when she got here?

A. Yes, there must have been; that captain said that is all he required when he first came here.

Q. Do you know if they are still on board?

A. In conversation [154] with the captain, he said that he had been using the canned beef there since then.

Q. And still is? A. As far as I know.

Mr. SMITH.—That is all.

Cross-examination.

Mr. OLSON.—Q. Mr. Moran, what experience have you had with reference to shipping?

(Testimony of J. P. Moran.)

A. 15 years with the Pacific Mail, 5 years with the Oceanic, and about 4 years with the China Mail.

Q. In what capacity did you act with those various companies?

A. Well, from dish washer to purser.

Q. Have you been on board the motorship "Benowa" since she has been in port? A. Yes.

Q. Did you make an examination of the vessel?

A. Yes, that is, by myself, around the deck and the engine-room.

Q. Did you make any investigation as to her condition, in so far as taking in water is concerned?

A. No, I did not make any examination, but I had conversation about it.

Q. When you state that an engineer is sufficient to take care of the motorship "Benowa," upon what do you base your opinion? A. Experience.

Q. Have you ever had any experience in having charge of vessels pumped out and having care taken of them generally when they are laid up port?

A. Yes.

Q. Would you say that any vessel that is laid up, of the style and the size of the "Benowa" irrespective of her condition, would only require one chief engineer to take care of her? A. And a watchman.

Q. It would not, in your opinion, then, make any difference whether one vessel leaked considerably more than another, in your opinion it would take only one engineer and a watchman to [155] take care of her?

A. It would only take one watchman; it would not

(Testimony of J. P. Moran.)

necessarily take an engineer all the time; it only requires an engineer in the necessity of pumping out.

Q. Do you know how often the "Benowa" needs pumping out? A. I presume—

Q. (Intg.) Do you know? I am not asking what you presume, but what you know.

Q. You don't know? A. Not just now.

Q. When did Captain Renny first call upon you subsequent to February 28th?

A. That is the first time I saw him.

Q. Was it on February 28th?

A. On that morning, that is my recollection.

Q. Where did you see him on that day?

A. In the office.

Q. In your office? A. 310 California Street.

Q. What office is that?

A. Pacific Motorship Company.

Q. Does anybody else have an office there?

A. The Pacific Freighters.

Q. Anybody else? A. W. L. Comyn & Co.

Q. Is there a firm there by the name of Comyn & Mackall? A. Not that I know of.

Q. Was there ever a firm by the name of Comyn & Mackall? A. I don't know.

Q. When did you next see Captain Renny after the morning of the 28th of February?

A. Well, positively, on March 5th; I could not say before that. I paid no attention to it.

Q. Did he come to your office at that time?

A. Yes.

Q. And did he see you? A. Yes.

(Testimony of J. P. Moran.)

Q. Did he make any request of you?

A. For provisions, yes.

Q. Where did you next see him?

A. I do not remember seeing him—possibly I did after that, but I cannot recall it now. [156]

Q. Do you recall seeing him at the office of the Shipping Commissioner? A. Yes.

Q. Who called you down there at that time?

A. Well, Mr. MacArthur asked me if I would favor him by going over, and I said yes.

Q. What did he say when he called you up on the telephone, or when he called up your office? Did he ask for you?

A. No, he did not ask for me, that I know of. But Mr. Baird asked me to speak through the phone to Mr. MacArthur, and I did.

Q. After speaking to him, what did you do?

A. He asked me to call over there at the office, if I would oblige him, and I told him I would do it.

Q. What request did he make of you there, if any?

A. He did not make any request of me. He spoke about paying the crew off, and provisions; he did not make any request of myself; he wanted to know what I knew about it. That was all.

Q. Didn't he tell you that demand had been made for the wages of the crew of the motorship "Benowa"?

A. No. He asked me what I knew about it; that is all; I did not answer him.

Q. Did you say anything to him about the Pacific motorship "Benowa" not having any credit, or

(Testimony of J. P. Moran.)

money in the treasury? A. No.

Q. You did not know, then, what you were called down to the office of the Shipping Commissioner for, did you?

A. Only just what I have mentioned; he spoke about the payroll and provisions, but, as I say, he did not make any request of me.

Q. Was Captain Renny there at that time?

A. Yes, he was there.

Q. Did he say anything to you at that time?

A. He spoke about provisions; Mr. MacArthur wanted me to O. K. the captain's signature to provide for the ship, and I told him I had no authority to do that. He wanted to know if I could procure provisions, [157] and I told him I did not have a dollar, nor did I know where I could get a dollar's credit, speaking for myself.

Q. Did you know that you were called there on account of the position you occupied with the Pacific Motorship Company? A. No.

Q. It is your belief, then, is it, that you were called down there and asked for charity on behalf of the motorship "Benowa"?

A. I do not consider it charity, no; as I stated before, Mr. MacArthur asked me, would I favor him by coming over to the office, and I told him yes, and I did, and he said just what I am telling you.

Q. You did not think he was making a personal request of you to furnish provisions for the crew, did you?

A. No, I don't think he considered me in that way;

(Testimony of J. P. Moran.)

I did not have that authority.

Q. You knew that he was speaking to you on account of the position which you occupied with the Pacific Motorship Company, did you not?

A. I do not see why he should; I am simply purchasing agent; I have nothing to do with her.

Q. Do you know whether or not he had asked for Mr. Ringwood or Mr. Comyn when he rang up?

A. No, I could not say that.

Q. You don't know?

A. No, I don't know who he asked for.

Q. Did you report this conversation to anyone else in the office of the Pacific Motorship Company?

A. No, I had no occasion to.

Q. Do you know who are the officers of the Pacific Motorship Company? A. Yes.

Q. Who are they?

A. Mr. Ringwood is all I know.

Q. What office does he occupy? A. President.

Q. Is there a vice-president?

A. Not that I know of.

Q. A treasurer? A. I could not say.

Q. You know of no other officers, then?

A. No, only Mr. Ringwood. [158]

Q. Was Mr. Ringwood in the office at the time that Mr. MacArthur spoke to you on the telephone?

A. No, I do not think he was.

Q. Have you seen Mr. Ringwood since that date?

A. Yes, I have seen him.

Q. How soon after that date did you see him?

A. I could not say, exactly.

(Testimony of J. P. Moran.)

Q. Did you report this conversation with Mr. MacArthur to him? A. No, I had no occasion to.

Q. On February 28th, there is an order upon West, Elliott & Gordon to deliver to the motorship "Benowa" certain provisions, signed Pacific Motorship Company, by J. B. Moran. A. Yes.

Q. Now, in view of signing that statement by the Pacific Motorship Company, and subsequently being called to the office of the Commissioner, do you still mean to say that you believe that he was calling upon you to ask personally to provide provisions for the motorship "Benowa's" crew, and not upon the Pacific Motorship Company?

Mr. SMITH.—I do not want to object, but you have already asked that question, and the witness has said that he was satisfied that the Commissioner did not send for him to ask him personally, but that the Shipping Commissioner, when he asked him for this thing, asked him as an officer or employee of the motorship company.

Mr. OLSON.—I do not recall his admitting that.

The WITNESS.—Yes, I have. I answered that in exactly the same way.

Q. I will ask again, to have no question about it, when you were called to the office of the Shipping Commissioner and asked about supplying provisions for the crew of the motorship "Benowa," in what capacity did you believe that you were called upon to supply those provisions? [159]

Mr. SMITH.—I object to that as not proper cross-examination, and the witness' behalf is immaterial.

(Testimony of J. P. Moran.)

A. I could not answer that question; I don't know what Mr. MacArthur was thinking about it.

Mr. OLSON.—Q. I am asking you what your belief was.

A. I believe, just as I said before, I thought he asked me over there, to be plain about it, to get all the information he could, and I could not given him any. That is all I know about it.

Q. Under what authority did you supply these provisions which are noted in your orders of February 28, 1921, and March 5, 1921?

A. As purchasing agent, port steward.

Q. When you were called upon on March 9th, didn't you have the same authority that you had on February 28th and March 5th?

A. The same authority as purchasing agent, yes.

Q. Did you say on March 9 that you had no authority to furnish provisions to the crew when requested to by Mr. MacArthur?

A. I did not say that.

Q. Did you not state in your previous testimony that you had no authority?

A. To sign an order that the captain might sign; in other words, approving his order, I had no authority to do that; or, in other words, I had no authority to give the captain authority to provide for the ship.

Q. Did you make any effort to provide provisions for the crew at that time? A. No.

Q. Were you requested to?

A. No—yes,—I was not requested, but I was spoken to by Mr. MacArthur, who thought the ship

(Testimony of J. P. Moran.)

ought to have provisions.

Q. Did you do anything at that time or subsequently thereto in reference to providing provisions for the crew?

A. No, because I was of the impression that they were discharging.

Q. What gave you that impression?

A. Mr. Ringwood. [160]

Q. What did Mr. Ringwood say to you?

Mr. SMITH.—I object to that as calling for hearsay.

Mr. OLSON.—Mr. Ringwood is an officer of the company.

A. Mr. Ringwood told me not to provide any more for them, that by the time the provisions that were sent there were consumed the crew would be discharged.

Q. When did he tell you that? A. March 5th.

Q. At that time, was anything said about the wages of the crew?

A. Not to me; I have not anything to do with that.

Q. And from Mr. Ringwood's statement to you, you believed that the crew would be discharged by the time these provisions were exhausted, and thereupon you had orders not to do anything else for the crew: Is that correct?

A. I have no such orders, no.

Q. What were the orders you received from Mr. Ringwood?

A. Mr. Ringwood told me by the time these pro-

(Testimony of J. P. Moran.)

visions were consumed that the crew would be discharged.

Q. Did you make any inventory of the provisions that were on board the "Benowa" when she arrived in port here on February 28th?

A. No. The captain told be what he had.

Q. Do you know long the provisions which you gave orders to West, Elliott & Gordon to furnish would last the crew of the "Benowa"?

A. I have an idea.

Q. Approximately what was your opinion as to the length of time they would last? A. 15 to 20 days.

Q. In your opinion, one case of milk, one sack of sugar, one sack of potatoes, 25 pounds of pork loin, 10 pounds of frankfurters, 6 heads of cabbage, 15 pounds of dried onions and 12 heads of lettuce would last a crew of approximately 28 men for 15 or 20 days? A. With what they had aboard the ship.

Q. Did you know what was on board the ship?

A. I did not know [161] exactly; I could not say accurately.

Q. Could you say approximately?

A. No, I could form an opinion, when they had sufficient there to do them from the 28th to the 5th, that they must have had quite a lot of stuff there.

Q. Did you ever make any investigation to find out whether or not the crew was discharged after Mr. Ringwood gave you these orders not to supply any further provisions?

A. No. I did not make any particular effort to, any more than I did in any of the others.

(Testimony of J. P. Moran.)

Q. Did you ever follow up this matter with Mr. Ringwood again, to find out if the crew was discharged?

A. No; I have been brought up this way in the steamship game, to mind my own business, and my superior officers tell me what to do; I do not ask them.

Q. Does Mr. Ringwood have charge of all the details, to know just when the provisions on board a ship will be exhausted, and does he tell you each thing to do in reference to supplying provisions?

A. Well, yes, we work together on that proposition.

Q. You work together, you say? A. Yes.

Q. If you should know of your knowledge or belief that the provisions would be exhausted by a certain time, you would report it to Mr. Ringwood, would you not? A. As a rule, yes.

Q. In this case, did you report anything further to Mr. Ringwood after March 5th?

A. No, because I considered the crew was discharged.

Q. Upon what do you base that opinion?

A. On what Mr. Ringwood had already told me.

Q. And, basing your opinion upon the fact that Mr. Ringwood told you that the crew would be discharged by the time that these provisions were exhausted, you never made any further effort, or never took the matter up with Mr. Ringwood to see whether or not you should provide further provisions for the crew? [162]

(Testimony of J. P. Moran.)

A. No, as I said before, he told me that, he gave me those instructions.

Q. Do you know how a crew is discharged?

A. Yes.

Q. When is done when a crew is discharged from a vessel?

Mr. SMITH.—I object to that as calling for the conclusion of the witness.

Mr. OLSON.—He has stated he has had many years' experience.

A. They are brought before the commissioner and paid off and discharged.

Q. Do you know whether or not these men were brought before the commissioner and paid off?

A. No, I have no knowledge of it.

Q. Do you know whether or not the men were coming into your office time after time, to find out about their wages?

A. No, I could not say that positively; I have no reason to know it.

Q. Did you have anything to do in your office in reference to checking up payrolls, or anything, when any of the crew of the vessels of the Pacific Motorship Company were paid off? A. No.

Q. Did you ever ask Mr. Ringwood if the crew of the "Benowa" had been discharged after March 5th?

Mr. SMITH.—He has already testified to that.

A. No.

Mr. OLSON.—Did you ever ask Captain Renny for a statement as to what was due the crew at or

(Testimony of J. P. Moran.)

about the time the Motorship "Benowa" was discharged?

A. Yes; I did for Mr. Baird, the auditor. He asked me if he was not there to ask the captain, and I did that.

Q. What date was that, about?

A. I could not tell you.

Q. Was it after you had been to the shipping commissioner's office?

A. I could not say exactly; I don't remember; I could not positively say. [163]

Q. Haven't you any idea at all as to what day that was?

A. No, I could not really say. I know Mr. Baird asked me as a favor if the captain came in to get the papers from him, and I did.

Q. What papers did Mr. Baird ask you to get?

A. I think it was the payroll; I could not say positively about that but I think it was the payroll.

Q. Did Mr. Baird just ask you to get the payroll and give it to him? A. That is all.

Q. Did he ask you to do anything with it?

A. I do not think he did .

Q. Did you get the payroll?

A. I could not swear to that; I could not honestly swear to that; but I recall the circumstance. Very often Mr. Baird asked me to do things that I do; sometimes I think about it and sometimes I do not. But I just recall that now, but positively, I could not say whether I got it or not.

(Testimony of J. P. Moran.)

Redirect Examination.

Mr. SMITH.—Q. Do you know where Mr. Ringwood is?

A. No, I could not positively say, but I think he is in Oakland.

Q. You think he is in Oakland?

A. I think so; I could not say positively say.

Testimony of Vincent Mitchell for Respondent.

VINCENT MITCHELL, called for the respondent, sworn.

Mr. SMITH.—Q. What is your name?

A. Vincent Mitchell.

Q. How old are you? A. 19.

Q. Where do you live? A. 625 Anza street.

Q. What is your business?

A. I am office boy for W. L. Comyn & Co.

Q. Any other corporation have their offices with W. L. Comyn [164] & Company?

A. Yes, Pacific Freighters and the Pacific Motorship Company did.

Q. Were you there in the employ of the office on April 1st of this year? A. Yes.

Q. And ever since? A. Yes.

Q. Do you remember bringing a letter up to this office at any time? A. Yes.

Q. When did you bring it up?

A. About April 1st.

Q. You say about. A. Yes.

Q. Are you positive it was April 1st, or is that

(Testimony of Vincent Mitchell.)

your best recollection?

A. I am pretty sure it was about April 1st.

Q. How do you fix the date?

A. Well, I remember the sinking of the steamer "Governor" on that date. I remember coming up here with a letter and going back to the office and seeing in the papers about the steamer "Governor." That is how I remember it.

Q. Do you remember who gave you that letter?

A. No, I do not.

Q. What did you do with the letter when you brought it up?

A. I gave it to the stenographer in Mr. Lillick's office.

Q. Do you remember to whom the letter was addressed? A. It was addressed to Mr. Lillick.

Q. Did you ever bring any other letters up here?

A. Yes, I did.

Q. When?

A. I guess the letter I brought up April 1st was the first letter, and then I brought up another letter a few days later than that.

Q. Who was that addressed to? A. Mr. Lillick.

Q. Where did you get that one from?

A. I don't know; I found both letters on my desk down in the office.

Q. That the custom of your office, to leave the letters on your desk?

A. Yes, if I am not there. [165]

Q. When the letters are there, do you bring them right up, or do you leave them there some time?

(Testimony of Vincent Mitchell.)

A. I bring them right up, because I have nothing else to do.

Q. Do you always bring them up on the day they are left there? A. Yes.

Q. Are there any other office boys in that office?

A. There was up to the 31st of March; he left.

Q. Now, you are the only office boy? A. Yes.

Mr. SMITH.—That is all.

Cross-examination.

Mr. OLSON.—Q. Mr. Mitchell, you say that the Pacific Motorship Company did have their offices there, they have their office there now, don't they?

A. Well I guess they have.

Q. You say they have. What made you say they did have their office there?

A. Well, I figure they still carry on their negotiations there.

Q. You don't know what was in those letters, do you? A. No.

Mr. OLSON.—That is all.

Redirect Examination.

Mr. SMITH.—Q. What you meant when you stated the company did have their offices there and were somewhat doubtful as to whether they had now, or not, you think the company has blown up; is that right? A. Yes.

Testimony of Patrick Baird, for Respondent.

PATRICK BAIRD, called for the respondent, sworn.

Mr. SMITH.—Q. What is your name?

A. Patrick Baird.

Q. How old are you? A. 32.

Q. Where do you live?

A. 1128 Sacramento Street.

Q. What is your business?

A. Accountant. [166]

Q. Where are you employed?

A. Pacific Motorship Company.

Q. Were you employed there during the months of March and April of this year? A. Yes.

Q. Do you know Captain Renny? A. Yes.

Q. Did Captain Renny ever come to you and ask you for any money, or make any demand upon you for money to pay the wages of the crew of the "Benowa"? A. No.

Mr. SMITH.—That is all.

Cross-examination.

Mr. OLSON.—Q. Mr. Baird, when did you first see Captain Renny subsequent to February 28th of this year?

A. I never met Captain Renny previous to that time, only on the arrival of the ship.

Q. When did you first see him?

A. I do not recall the exact date.

Q. Approximately? That is on the day that the vessel came in?

(Testimony of Patrick Baird.)

A. The day the vessel arrived, yes.

Q. Where did you see him? A. In the office.

Q. Did you have any conversation with him?

A. Yes, just spoke in general conversation regarding the voyage.

Q. When did you next see him?

A. About two days later, I believe it was; I am not very positive about that.

Q. Did he have any conversation with you at that time? A. Just general conversation.

Q. Was there anything said about money for the crew? A. No, nothing.

Q. Did you have any conversation with him about provisions for the crew? A. No.

Q. That subject was never taken up with you?

A. Not with myself, not with me.

Q. Did you answer the telephone on the day that Mr. MacArthur [167] rang up the office, which was about March 9th of this year? I will withdraw that question. Do you recall telling Mr. Moran, of your office, that Mr. McArthur wanted to speak to him on the telephone on or about March 9th?

A. Yes, I believe I did.

Q. Did you answer the telephone first from Mr. MacArthur? A. No, I do not think I did.

Q. Did you have any conversation with Mr. MacArthur on that day over the telephone?

A. No, only after somebody else called me to the phone, I spoke in the presence of another party.

Q. Who was asked for then?

A. Mr. Ringwood, I believe it was.

(Testimony of Patrick Baird.)

Q. Mr. Ringwood was asked for?

A. I believe he was.

Q. What did you say?

A. I spoke to Mr. Ringwood, and he referred me to Mr. Moran, I believe it was.

Q. Who referred you to Mr. Moran?

Mr. SMITH.—I do not want to interrupt, but this is not cross-examination.

Mr. OLSON.—I will make him my own witness, then.

Mr. SMITH.—Your case is closed.

Mr. OLSON.—It is not closed for rebuttal.

Q. What did you say to Mr. Ringwood?

A. I just said Mr. MacArthur wished to speak to him.

Q. What did Mr. Ringwood say?

A. He referred me to Mr. Moran; he wanted Mr. Moran to take the matter up; he had nothing to speak to Mr. MacArthur about.

Q. That he had nothing to speak to Mr. MacArthur about? A. Yes.

Q. Did you ask Mr. Moran at any time to get up an account for the crew of the motorship "Benowa"? A. An account?

Q. Yes. A. A payroll?

Q. A payroll. A. I think I did.

Q. Do you recall about what date that was?

A. About the date of [168] the discharge; I think it must have been about the 17th of March, or thereabouts.

Q. You are pretty certain it was about that date,

(Testimony of Patrick Baird.)

are you? A. About that date, I think it was.

Q. Did you tell Mr. Moran why you wanted it?

A. Because I thought we would be paying off in a few days, and I wanted to have it ready.

Q. You told Mr. Moran that, did you? A. Yes.

Q. That you thought they would be paid off in a few days, and you wanted to have it *read*?

A. Yes, and I thought we would want to have the payroll ready.

Q. What makes you think it was about the 17th of March?

Mr. SMITH.—Mr. Olson, that is not cross-examination.

Mr. OLSON.—I am examining him.

Mr. SMITH.—I have a right to enter my objection.

Mr. OLSON.—You can enter your objection, if you want to.

Mr. SMITH.—This is not cross-examination of the witness.

A. I am just referring to that; I do not remember the exact date; I am not quite clear on that.

Mr. OLSON.—Q. Do you recall whether or not it was approximately the time that the vessel finished discharging?

Mr. SMITH.—The same objection.

A. I believe so.

Mr. OLSON.—Q. Did Mr. Moran get the payroll for you? A. Yes.

Mr. SMITH.—The same objection.

Mr. OLSON.—Q. He made up the payroll?

(Testimony of Patrick Baird.)

A. No, he did not make it up.

Q. Did he have anything to do with it? A. No.

Q. Do you know where he got the payroll from?

A. On board the [169] ship, I suppose.

Q. You positively remember that you told Mr. Moran that you wanted that payroll because you thought the men would be paid off in a few days.

Mr. SMITH.—The same objection.

A. I believe, I am not quite sure, but I think that is probably the reason why I said it.

Mr. OLSON.—Q. Did you ever see any of the members of the crew coming into the office, that is, members of the crew of the motorship "Benowa," between the 1st of March and the 31st of March?

Mr. SMITH.—I object to that as not cross-examination. I never asked him about any visits of the crew.

A. Only for mail; I saw them through the window, but had no conversation with them at all.

Mr. OLSON.—That is all.

Mr. FRANK.—Q. As auditor of the Pacific Motorship Company, you are acquainted with the funds of the company, aren't you? A. Yes.

Q. At the time the crew came into the port of San Francisco, state whether or not there were any funds available for the payment of the crew?

A. No.

Q. They did not have any money, did they?

A. No.

Q. Did they have any credit? A. No.

Q. Is that the reason they were not paid?

(Testimony of Patrick Baird.)

A. I believe so.

Q. That is all there is to it, isn't it? A. Yes.

Mr. OLSON.—Q. Mr. Baird, did you make any attempt to get any money to pay the crew?

Mr. SMITH.—I object to that as not cross-examination.

A. No, I could not do anything with regard to that. [170]

Mr. OLSON.—Q. You had nothing to do with that? A. No.

Mr. OLSON.—That is all.

Mr. SMITH.—That is all.

Testimony of W. L. Comyn, for Respondent.

W. L. COMYN, called for respondent, sworn.

Mr. SMITH.—Q. What is your name?

A. W. L. Comyn.

Q. How old are you? A. 44.

Q. Where do you live? A. San Francisco.

Q. What is your business?

A. Merchant, manufacturer, ship owner.

Q. How long have you been in the shipping business? A. 20 years.

Q. Do you know where the "Babinda" is now?

A. Yes.

Q. Where is she? A. Pier 21.

Q. Who is on her? A. Port engineer.

Q. How long has there been nobody on her but the port engineer? A. Since she was discharged.

Q. About when?

(Testimony of W. L. Comyn.)

A. Well, I could not say without looking up the records.

Q. A month? A. I should say so.

Q. Do you think it is prudent and proper to leave a vessel like that without anybody on except the port engineer? A. Absolutely.

Q. Is the "Babinda" any different from the "Benowa"? A. They are sister ships.

Q. Do you think the "Benowa" would have been all right if left with the port engineer in charge?

A. Yes. If there had been no receiver for the Pacific Motorship Company, there would have been no crew remaining in board the "Babinda" or on board the "Benowa."

Mr. FRANK.—You do not mean that the receiver is keeping [171] the crew on board, do you?

A. I mean to say we could not put them off, because the receiver is in charge. The Pacific Motorship Company had no authority as long as there was a receiver.

Q. You do not mean to say that the receiver has engaged the crew?

A. No, I do not mean that, but I mean this, that we had no authority, the Pacific Motorship Company had no authority to turn that crew off as long as there was a receiver in charge of the ship.

Mr. SMITH.—Q. You heard the talk about the "Benowa" making water, did you not? A. I did.

Q. Did you examine the engine-room log yourself? A. I did not.

Q. I ask you to look at it now.

(Testimony of W. L. Comyn.)

A. I looked at it.

Q. Do you think the amount of water which these men have testified that log shows that they pumped was sufficient to require any extra pumping on the vessel?

A. No. With the port engineer on board, the port engineer would have taken care of that himself.

Q. Could these engines be operated by one man, alone? A. One man and a watchman.

Q. With what corporation are you connected?

A. I am president of W. L. Comyn & Co., a corporation.

Q. What relation has W. L. Comyn, Inc., to the Pacific Motorship Company? A. General agents.

Q. As general agents, did you have men available to take care of this vessel, the "Benowa"?

A. A port engineer.

Q. And a watchman? A. And a watchman.

Q. How long have you been connected with the Pacific Motorship Company in this capacity?

A. Since its organization.

Q. How long ago was that, approximately?

A. About a year; [172] I will say about a year or a year and a half ago.

Q. In that capacity, were you familiar with the financial condition and general operation of the Pacific Motorship Company? A. More or less.

Q. In your opinion, is the Pacific Motorship Company solvent to-day?

Mr. OLSON.—I object to that question as calling for the conclusion of the witness.

(Testimony of W. L. Comyn.)

A. It is not.

Mr. SMITH.—Q. Do you know, as a matter of fact, whether or not it is solvent?

A. I should say it is insolvent.

Q. How long has it been insolvent?

A. Since I stopped advancing it money.

Q. When was that?

A. Since the Australian Government brought its suit.

Q. Was the company insolvent before that time?

A. Yes, I should say it was insolvent.

Q. For how long had it been insolvent?

A. I should say a month or six weeks.

Q. During the months of March and April of this year, has the Pacific Motor Company had any credit whatever? A. No; I stopped its credit.

Q. Could the company obtain credit from any other source than you? A. No.

Q. Has the company had any money in bank, or other money during that period?

A. None, except such money as I advanced to it.

Q. Could the company have paid the wages of the crew of the "Benowa"?

A. Not unless I advanced the money.

Q. Would you advance the money?

A. If the Australian Government had not brought suit and thrown it into the hands of the receiver, [173] I might have advanced it.

Mr. SMITH.—Mr. Olson, I want to offer on our behalf the record in this suit of Commonwealth of Australia vs. Pacific Motorship Company, which has

(Testimony of W. L. Comyn.)

already been offered by Mr. Frank. I want to ask you, Mr. Olson, to stipulate that the contract annexed to the complaint in that suit was made by the Pacific Motorship Company. If you do not care to stipulate, I can have Mr. Comyn obtain the original.

Mr. OLSON.—I have never seen it; I do not know anything about it. In fact, I have not seen any of the papers in that suit, except such papers as have been copies which have been served on this office.

Mr. SMITH.—You know of the pendency of the suit, however?

Mr. OLSON.—Yes.

Mr. SMITH.—Will you telephone and get the original contract, Mr. Comyn?

A. Do you want the original?

Q. I want the contract. A. Yes.

Q. What vessels of the Pacific Motorship Company are now in this harbor?

A. The "Babinda," "Benowa," and the "Cethano."

Q. What other vessel does the Pacific Motorship Company own?

A. The "Balcatta," the "Boobyalla," the "Culburra," the "Coolcha," the "Challambo."

Q. Where is the "Balcatta"?

A. The "Balcatta" is in Talcahuana.

Q. What is her condition?

A. I cannot say what her condition is. She is badly damaged.

Q. I will ask you whether or not she was cap-

(Testimony of W. L. Comyn.)

sized? A. She was.

Q. Until recently? A. Until recently.

Q. Are there libels and other claims on her?

A. There are heavy libels on her for salvage, etc.

Q. Amounting to how much?

A. Amounting to approximately [174] \$100,000.

Q. Where is the "Boobyalla"?

A. The "Boobyalla" is in Valparaiso.

Q. What is her condition?

A. I released her libels last night.

Q. What was the extent of the libels?

A. Some \$12,000.

Q. Where is the "Coolcha"? A. In Callao.

Q. What is her condition?

A. She is libeled.

Q. For how much?

A. Might I suggest that I tell you the total indebtedness on the West Coast of South America is \$130,000.

Q. By that you include what vessels?

A. The debts of the vessels on the West Coast, excluding the "Balcatta," are \$79,000.

Q. And the vessels on the West Coast are the "Boobyalla," the "Coolcha," the "Callamba" and the "Culburra"? A. Yes.

Mr. SMITH.—I will now offer in evidence the records of this court in the case of the Pacific Steam Navigation Company vs. "Cethano," in Admiralty, No. 17,103; Pacific Steam Navigation Company vs. "Babinda," in Admiralty, No. 17,104; McIntosh vs. "Benowa," in Admiralty, No. 17,116;

(Testimony of W. L. Comyn.)

West, Elliott & Gordon vs. "Cethano," in Admiralty, No. 17,117; West, Elliott & Gordon vs. "Babinda," in Admiralty, No. 17,118; West, Elliott & Gordon vs. "Benowa," in Admiralty, No. 17,119; Klittgaard vs. "Babinda," in Admiralty, No. 17,120; Haviside vs. "Babinda," in Admiralty, No. 17,125; Haviside vs. "Centhano," in Admiralty, No. 17,126; Marshall vs. "Chethano," in Admiralty, No. 17,128; Jebesen vs. "Benowa," in Admiralty, No. 17,129; Mason vs. "Babinda," in Admiralty, No. 17,130; Outer Harbor Dock Company vs. "Babinda," in Admiralty, No. 17,134; Outer Harbor Dock Company vs. "Cethano," in Admiralty, No. 17,135; Henry vs. "Benowa," in Admiralty, No. 17,139; Pacific Steam Navigation Company vs. Pacific Motorship Company, in Admiralty, No. 17,142; Pacific Construction Company [175] vs. "Benowa," in Admiralty, No. 17,145; Commercial Import Company vs. "Cethano," in Admiralty, No. 17,146. There are other libels, Mr. Frank, but I think those are sufficient to cover the point. Aside from this contract, Mr. Olson, I have no other questions to ask of Mr. Comyn, and you may proceed with your cross-examination.

Cross-examination.

Mr. OLSON.—Q. How long have you been general agent for the Pacific Motorship Company?

A. Since its inception.

Q. Who are the officers of the Pacific Motorship Company?

A. Mr. Ringwood is president, Mr. L. C. Stewart

(Testimony of W. L. Comyn.)

is vice-president and treasurer; Mr. Holmberg is secretary.

Q. You said on direct examination that if a receiver had not been appointed that the crew of the "Benowa" would not have been on board the ship at this time. Upon what do you base that statement?

A. They would have been discharged.

Q. Do you know when the receiver was appointed?

A. No, I could not tell the exact date he was appointed.

Q. If the records show that he was appointed on March 26th of this year, would the crew have been discharged previous to that time?

A. No; not while the Australian Government's suit had been filed; we were expecting a receiver every minute from the day of the bringing of the suit.

Q. You stated that at the time the vessel arrived here there were no funds in your hands to make—

A. (Intg.) I did not say in our hands. I said in the hands of the company.

Q. In the hands of the company?

A. Of the Pacific Motorship Company.

Q. That there were no funds in the hands of the Pacific Motorship Company to pay the crew of the "Benowa." Did you make any attempt to obtain funds?

A. I did, as is well known to Mr. Lillick. [176]

Q. What attempt did you make?

A. We assigned the freight on the "Benowa" to

(Testimony of W. L. Comyn.)

Mr. Lillick for the payment of the crew's wages.

Q. In what form did you make that assignment?

A. The assignment was in the form that Mr. Lillick requested.

Q. Who was that freight payable to?

A. The freight was payable to the Pacific Motorship Company.

Q. If the contract would show that that freight was paid to Houlder, Weir & Boyd, of New York, would you still claim that it was payable to the Pacific Motorship Company?

A. Yes. Houlder, Weir & Boyd were merely agents for the Pacific Motorship Company.

Q. Did you make any other attempt to obtain that money—obtain the money for the payment of the crew?

Q. Did I make any other attempt, when the company was in the hands of the receiver?

Q. Yes. A. Certainly not.

Q. Did you, before the receiver was appointed?

A. I did by assigning that freight to Mr. Lillick.

Q. Did you know or learn thereafter that the crew never obtained any of that money?

A. I learned it later.

Q. Did you attempt to hypothecate any of the property of the Pacific Motorship Company to pay the crew?

A. I could not while it was in the hands of a receiver.

Q. Did you make any attempt to hypothecate any of the property before the receiver was appointed?

(Testimony of W. L. Comyn.)

A. No. I assigned sufficient of the freight to permit the collection by Mr. Lillick of funds to pay the wages.

Q. After you learned that this money was attached—

A. (Intg.) The company was then in the hands of a receiver.

Q. Do you know when this libel was filed against the motorship “Benowa”?

A. Which libel? [177]

Q. This libel of the crew of the “Benowa.”

A. No, I do not know. I believe that libel was reported to me as filed on the 15th of March.

Q. Did you make any attempt, prior to that time, to obtain any money for the crew?

A. Prior to that time?

Q. Yes.

A. Only by arranging for the freight to be paid to Mr. Lillick.

Q. That was subsequent to the filing of the libel, was it not? A. That I could not say.

Q. Did you make any attempt to provide provisions for the crew after she came in, other than what has been testified here to by Mr. Moran?

A. I am not the operating department; that is not my business; we are merely general agents. We do not operate the ships. The company conducts its own operations.

Mr. LILLICK.—The question as to the amendment of the libel to show that S. J. Ryan is improperly named in the libel as S. J. Wright has

(Testimony of W. L. Comyn.)

not yet been settled, other than that the attorney for Mr. Gerber refused to permit the amendment, and I wish to state in the record that as soon as it will be possible for us to file a libel on behalf of S. J. Ryan, that is, after the discharge of the receiver, that libel will be filed, in order that S. J. Ryan's rights be protected; but it will only result in the loss that will be suffered by whomsoever may have ultimately to pay the bill, and the procedure seems to me so useless that I wish to again ask counsel for Mr. Gerber whether he will be willing to stipulate that S. J. Ryan, named as S. J. Wright in the libel, may have the benefit of whatever judgment may be rendered in this case, in order that that useless cost may be saved.

Mr. SMITH.—I will say this, that my refusal to consent to [178] such an amendment was based expressly on the ground that this matter had been referred to the Commissioner for the purpose of taking testimony, and not for the purpose of amending the libel. I am considering, and have under advisement, the question of consenting by a proper stipulation to amending the libel, but as yet I have not had an opportunity to investigate the matter, and will let you know to-day.

Mr. LILLICK.—I only wish the record to show that we have no desire to add anything to the cost of this proceeding. I have stated that otherwise the libel would be filed, and it will be filed within a very few hours of the discharge of the receiver; if, prior to that time, counsel has not agreed to

(Testimony of W. L. Comyn.)

stipulate to it, it, of course, will then be necessary to take a part of this testimony over again, and perhaps all of it.

Mr. SMITH.—Q. Mr. Comyn, do you know whether or not the contract, a purported copy of which is attached to the complaint in the receivership proceedings, was actually executed by the parties whose names purport to be signed to it?

A. It was.

Mr. OLSON.—I offer all of this correspondence in this file, and ask that it be marked Libelants' Exhibit "D."

(The correspondence was marked Libelants' Exhibit "D.")

Testimony of W. E. Gerber, Jr., for Respondent.

W. E. GERBER, Jr., called for the respondent, sworn.

Mr. SMITH.—Q. What is your name?

A. W. E. Gerber, Jr.

Q. How old are you? A. 25.

Q. Where do you live? A. 2309 Broderick.

Q. Have you purchased the claim of the Commonwealth of Australia as set up in the receivership proceedings? A. I have. [179]

Q. When was that transfer consummated?

A. Saturday.

Q. Last Saturday? A. Yes.

Q. At what time? A. 12 o'clock or 12:30.

Q. I will ask you when you first had any assurance that you would be able to make this purchase?

(Testimony of W. E. Gerber, Jr.)

A. When did I first?

Q. Yes.

A. About the 21st of April—it was a week ago Wednesday.

Q. Or last Wednesday?

A. Last Wednesday, a week from the coming Wednesday.

Q. That isn't the 21st. You mean last Wednesday was the day?

A. Yes, last Wednesday was the day.

Q. That information came to you by cable?

A. By cable, yes.

Cross-examination.

Mr. OLSON.—Q. Mr. Gerber, what interest, if any, did you have in these proceedings prior to your negotiation for this claim of the Commonwealth of Australia? A. No interest.

Q. What is your business?

A. I am in business for myself.

Q. What kind of business are you in?

A. I have not any regular line of business at all; I have had money at my disposal that I could use just as I wish.

Q. Then prior to your purchasing this claim of the Commonwealth of Australia, you had no interest whatever in this proceeding, did you?

A. No.

Q. When did you first hear of this proceeding?

A. I should say about two weeks ago, pretty close.

Q. Then you are purchasing this claim on your

(Testimony of W. E. Gerber, Jr.)

own behalf, are you? A. Yes.

Q. Is that the reason that you have made this offer to the crew of the "Benowa"? A. Yes.

Q. You have purchased only the claim of the Commonwealth of Australia?

A. Their contract, yes. [180]

Q. Have you made a purchase of the vessels?

A. Yes.

Q. And that includes the motorship "Benowa"?

A. It does.

Q. When did you make that purchase?

A. When I took over the claims.

Q. When was that?

A. When I took over the contract, really.

Q. When was that?

A. That was Saturday, at 12 o'clock.

Q. What was the nature of the claim of the Commonwealth of Australia?

A. A claim for \$125,000—\$162,000—no, \$1,625,000.

Mr. OLSON.—That is all.

Redirect Examination.

Mr. SMITH.—Q. The claim of the Commonwealth of Australia is \$1,625,000? A. Yes.

Q. As a matter of fact, the boats which the Commonwealth own are the "C" boats, the "Cethana," the "Culburra," the "Coolcha," the "Challamba"; that is right, is it not? A. Yes.

Q. And the interest of the Commonwealth in the "B" boats is a first mortgage, is it not? A. Yes.

**Testimony of W. L. Comyn, for Respondent
(Recalled—Cross-examination).**

W. L. COMYN, recalled for further cross-examination.

Mr. OLSON.—Q. Mr. Comyn, have you at any time had any interest in the Pacific Motorship Company other than as general agent?

A. No; and I am out my commission of about \$85,000 to date.

Mr. OLSON.—I think that is all.

Mr. SMITH.—Mr. Comyn, where is Mr. Ringwood? A. He is away on his honeymoon.

Q. How long do you expect him to be gone?

A. I have not the least idea. He is down at Los Angeles, I believe, somewhere.

Q. Have you his address? A. No, I have not.

Mr. SMITH.—In that connection, I would like to say that maybe that we want Mr. Ringwood's testimony to rebut some of these statements, [1801½] and I will ask leave to reopen the case when I have been able to locate Mr. Ringwood. I want to notify you now that that may be the case so that you will not say you were taken by surprise. It is impossible for us to locate Mr. Ringwood at the present time.

Mr. OLSON.—Q. Mr. Comyn, when did Mr. Ringwood leave here?

A. He left here about the 28th of April, I believe. He married the stenographer in the office.

Mr. OLSON.—I object to any continuance for the purpose of taking the testimony of Mr. Ringwood upon the ground that he was here in town at the

(Testimony of W. L. Comyn.)

time that this case was noticed to be set for trial, and his testimony could have been taken prior to his departure had it been desired by anyone interested in this case.

Mr. SMITH.—We did not know, Mr. Olson, that testimony would be given on your side as to conversations with Mr. Ringwood. We did not think Mr. Ringwood was in any way implicated in this case.

Mr. OLSON.—Mr. Ringwood is president of the Pacific Motorship Company, and you certainly should have known.

Mr. SMITH.—There is one other point; I want to offer in evidence a copy of a bill of sale of the “Benowa” by the Pacific Motorship Company to the Anglo California Trust Company, dated October 21, 1920.

Mr. OLSON.—Is it recorded?

Mr. SMITH.—I do not know. That is our case.

Testimony of W. C. Renny, for Libelant (Recalled).

W. C. RENNY, recalled for libelant.

Mr. OLSON.—Q. I will hand you a letter here dated [181] San Francisco, Cal., October 28th, 1920, W. C. W. Renny, Esq., Captain M/S “Benowa,” c/o Allen & Friedrichs, New Orleans, La.

“Dear Sir: Your letter of the 21st of October, with respect to Sulphur and Coal Charter Parties came duly to hand, and in reply thereto please be advised that we have made arrangements with the

(Testimony of W. C. Renny.)

coal Charterers to extend the cancellation date to November 30th.

Under the circumstances, I feel assured that you will be able to make this date.

Yours very truly,
PACIFIC MOTORSHIP COMPANY,
R. J. RINGWOOD, President."

Mr. SMITH.—I object to that as immaterial, irrelevant and incompetent, and having nothing to do with this case, and mere hearsay.

Mr. OLSON.—Q. I will ask you whether or not you are familiar with Mr. Ringwood's signature?

A. The first time that I saw it was on this letter.

Q. Did you receive that through the mail?

A. Yes.

Mr. OLSON.—I will ask that it be introduced in evidence and marked Libelants' Exhibit "E."

Mr. SMITH.—I object to it on the grounds stated.
(The letter is marked Libelants' Exhibit "E.")

Mr. OLSON.—Q. I will hand you another letter dated March 11, 1921, signed Pacific Motorship Company, R. J. Ringwood, and ask you whether or not you received that letter. A. Yes.

Mr. OLSON.—I will ask that this be introduced in evidence and marked Libelants' Exhibit "F."

Mr. SMITH.—The same objection. [182]

Mr. OLSON.—Q. Captain, you have testified that you called at the office of the Pacific Motorship Company, at 310 California Street, on various occasions subsequent to your arrival, and I will ask you whether or not you ever demanded from Mr. Baird

(Testimony of W. C. Renny.)

any money on account of wages of the crew of the motorship "Benowa"? A. Yes.

Q. About how many times did you make that demand?

Mr. SMITH.—I object to this as cumulative. The captain has already testified to it.

A. I will say not less than six times.

Mr. OLSON.—Q. Each time you made demand for money for the crew?

A. Made demand for the money; yes.

Q. Did you also make demand for provisions?

A. No, not from him.

Q. Did you make any demand for provisions from anyone else?

A. I made demand for provisions from Mr. Ringwood and also from Mr. Moran.

Q. About how many conversations did you have with Mr. Ringwood?

Mr. SMITH.—I object to this as not proper rebuttal, as we have not had any testimony at all about the Ringwood conversations.

A. At least four conversations, altogether, but they were not all about provisions and money.

Mr. OLSON.—Q. Did you have any conversations with Mr. Ringwood about money for the crew or provisions? A. Yes.

Q. Did you demand of him that he furnish money for wages and subsistence?

A. I asked him. I did not demand.

Q. Did he ever state to you that the motorship "Benowa" had been sold or a bill of sale had been

(Testimony of W. C. Renny.)

executed transferring the "Benowa" from the Pacific Motorship Company to any other person or firm? A. No. [183]

Mr. SMITH.—I object to that as not proper rebuttal, incompetent, merely calling for hearsay.

Mr. OLSON.—Q. Did you ever receive any notice of any kind from the Anglo-California Bank of San Francisco with reference to the motorship "Benowa"? A. No.

Q. Did you ever receive any notice of any kind of any transfer or assignment, or bill of sale, by the Pacific Motorship Company, of the motorship "Benowa" to any person or firm? A. No.

Cross-examination.

Mr. SMITH.—Q. Mr. Renny did you ever demand anything from Mr. Comyn?

A. No; I never spoke to Mr. Comyn, that is, in this connection, until Mr. Comyn said something up in the Commissioner's office about the provisions that were on the ship. That was the first time I heard Mr. Comyn speak on my arrival in San Francisco this time.

Q. Why didn't you talk to Mr. Comyn about this matter?

A. Because I didn't know that Mr. Comyn had anything to do with the handling of the ships other than being the agent.

Q. Didn't you think the agent had something to do with the ship?

A. No, I did not. I think the president of the

(Testimony of W. C. Renny.)

company is the man I ought to go to.

Q. You knew he was the agent?

A. The president of the company referred me to Baird, and also referred me to Mr. Moran; he never referred me to Mr. Comyn.

Q. But you knew that Mr. Comyn was the agent?

A. I have been told he was the agent; I had nothing to prove he was. I heard him say so to-day.

Redirect Examination.

Mr. OLSON.—Q. Did you ever have any communication with Mr. Comyn with reference to the vessel? A. I never had. [184]

Q. Did you ever receive any orders from Mr. Comyn? A. No.

Testimony of W. L. Comyn, for Respondent (Recalled—Cross-examination).

W. L. COMYN, recalled for further cross-examination.

Mr. OLSON.—Q. Mr. Comyn, prior to the conversation with Mr. Lillick with reference to the assignment of the freight moneys of the motorship "Benowa," did you make any attempt to get any money for provisions, or wages for the crew of the motorship "Benowa"?

A. As I told you, I had nothing to do with provisions. The wage question was settled by that assignment. There was no need to get any money for wages before the ship was discharged.

(Testimony of W. L. Comyn.)

Q. That may be your opinion, Mr. Comyn, but I am asking you.

A. There was no demand made on us for wages, Mr. Olson.

Q. I am asking you the question whether or not you made any attempt to obtain money.

A. There was no necessity to, because there was no demand for money.

Q. Will you answer the question?

A. I have answered the question.

Q. Read the question, Mr. Reporter.

(Last question repeated by the reporter.)

A. I have answered it.

Q. That is, when you say there was no demand made prior to that time, do you mean there was no demand made of you?

A. There was no demand made of the company, or I would have been notified.

Q. Did you know that Mr. Moran had been called to the office of the United States Shipping Commissioner on or about March 9? A. I did not.

Q. Did you know that he had called up your office and asked for you or Mr. Ringwood?

A. I did not. I never heard of it before. I was so informed the other day as the result of testimony taken here. If I had been in the office I would have been notified, [185] and I would have talked to him.

Q. Upon what do you base your opinion, then, if any demand had been made upon the office that you would have known whether or not such a de-

(Testimony of W. L. Comyn.)

mand had been made?

A. Because in every other case I have been promptly advised.

Q. In every other case but the one which I have mentioned?

A. In every other case except this "Benowa" case.

Q. But you admit in this "Benowa" case there were demands made in reference to the wages?

A. I do not admit there were any demands made.

Q. Let me finish the question. You admit there were demands made which you did not know about?

A. I do not admit there were any demands made by the master or the crew that I did not know about.

Q. Did you not state that you did not know of the demand made at the office of the United States Shipping Commissioner until you heard him testify here in this office?

A. I did not hear him testify in this office.

Q. Until you heard that he did testify to that effect in this office?

A. What I heard that he had testified to in this office was that he had called me personally on the telephone, which I had never known anything about before.

Mr. OLSON.—That is all.

Redirect Examination.

Mr. SMITH.—Q. How much money did Captain Renny draw in Panama?

A. We are advised by the Pacific Steam Naviga-

(Testimony of W. L. Comyn.)

tion Company that we owe them \$3,060 odd for funds supplied to them at Colon.

Recross-examination.

Mr. OLSON.—Q. Mr. Comyn, you do not mean to state that Captain [186] Renny obtained those \$3,060 odd at Colon, do you?

A. Mr. Olson, the vessel is chartered free of canal dues coming through the Canal by the United States Government. We have no vouchers from the Pacific Steam Navigation Company for those \$3,060; until we get the vouchers, we cannot say who got that money, or for what purpose it was used.

Testimony of W. C. Renny, for Libelant (Recalled).

W. C. RENNY, recalled for libelant.

Mr. OLSON.—Q. Captain Renny, did you obtain any money at the Panama Canal from anyone, as master of the motorship “Benowa”?

A. No, not a five-cent piece from anybody.

Mr. OLSON.—That is all.

Cross-examination.

Mr. SMITH.—Q. Mr. Renny, you are the only person that can obtain money for the “Benowa”?

A. No. Somebody, apparently, received \$3,500.

Q. Who else on the “Benowa” could receive money?

A. I don’t know. I have not the slightest idea.

Q. Could the purser receive the money?

A. There is no purser.

Q. You keep the accounts of the ship?

A. No, I do not keep the accounts of the ship.

Testimony closed. [187]

In the District Court of the United States for the
Southern Division of the Northern District of
California, First Division.

R. J. SPENCER et al.,

Libelants,

vs.

American Motorship "BENOWA," etc.

Report of United States Commissioner.

To the Honorable the District Court of the United
States for the Southern Division of the North-
ern District of California, First Division, and
the Judges Thereof:

PURSUANT to an order of Court made herein
referring this cause to me to take the evidence and
report the same to the Court, I have to report that I
was attended by the proctors for the respective par-
ties, and the accompanying testimony hereunto an-
nexed and made a part hereof, consisting of vol-
umes one and two, was taken as therein set forth.
Accompanying said testimony are seven exhibits re-
ferred to in the testimony and marked "A," "B,"
"C," "C-2," "D," "E," "F," respectively.

All of which is respectfully submitted.

[Seal]

FRANCIS KRULL,

United States Commissioner for the Northern Dis-
trict of California, at San Francisco.

Dated, May 7, 1921.

[Endorsed]: Filed May 9, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [188]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H.
COUNCILL, TIM HARRIGAN, FRANK-
LIN ADREAN, Jr., FRANK GARLOCK,
BIRGER JOHANSEN, FRITZ SHIL-
LING, AXEL JOHNSON, JOHN LAHTI-
MEN, WILLIAM H. CRAWFORD, J. B.
HUGHES, WALTER S. AUSTIN, LEON
A. CARTER, CAMPBELL A. HOBSON,
W. OWENS, W. C. WARD, N. E. AUSTIN,
CHARLES V. SMITH, H. D. WRIGHT,
ROBERT DOUGLE, JOHN LOPEZ,
WILLIAM OVID, S. J. WRIGHT, G.
GARFIELD, and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her En-
gines, Boilers, Tackle, Machinery, Apparel
and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corpora-
tion,

Claimant.

THE COMMONWEALTH OF AUSTRALIA and
WILLIAM MORRIS HUGHES, Attorney
General of Said THE COMMONWEALTH

OF AUSTRALIA, for Said THE COMMONWEALTH OF AUSTRALIA,

Intervening Libelant.

(W. E. GERBER, Jr.,

Substituted Intervening Libelant.)

Supplemental Decision.

Filed May 17, 1921.

IRA S. LILLICK, Proctor for Libelants.

PILLSBURY, MADISON & SUTRO, Proctors
for Respondent and Substituted Intervening
Libelant, W. E. Gerber, Jr.

NETERER, District Judge.

The libelants, on January 21, 1921, signed articles with the master of the steamship "Benowa," at the Port of [189] Baltimore, to ship on a voyage from the Port of Baltimore to via one or more coastwise ports to one or more ports on west coast of the United States, and final port of discharge on west coast of United States, for a period not exceeding three calendar months, "and if crew is discharged on the west coast, transportation will be paid back to Port of Baltimore, Maryland." The vessel arrived in San Francisco February 28th, and was discharged March 17th at the Port of San Francisco.

On March 8th an action was commenced by the Commonwealth of Australia and others, plaintiffs, vs. Pacific Motorship Company, a corporation, and others, defendants, owners of the "Benowa," praying the appointment of a receiver. The receiver was appointed on the 26th day of March for eleven

motorships, including the "Benowa," and for the interests of the defendants in thirteen other ships. The receiver qualified on the 28th day of March.

This libel was filed on March 15th. On arrival of the vessel in the Port of San Francisco, there was a scarcity of provisions on the steamship "Benowa," the claimant being unable, apparently, to supply the same; but the master and crew remained on the ship. The receiver did nothing for the physical care of the ship, or for supplying the same, or for the supplying of any provisions, the ship being in the custody of the United States marshal. Demand was made upon the master for 50 per cent of the wages earned on the voyage upon arrival at the Port of San Francisco. Payment was refused by the master, it then not being determined whether discharge would be made at *his* port, and he being unable to pay because of the financial condition of the company. The master and crew, except two or three members [190] of the crew, remained on the vessel and discharged the routine duties of the vessel, which was lying at anchor. No provisions being furnished, the men not being paid, and being without means of support, on the 10th day of March, 1921, the following agreement was entered into by the officers and members of the crew with J. R. Wilson, Inc.:

"We the undersigned officers and members of the crew of the M/S. 'Benowa,' do hereby agree to pay from our subsistence money or wages, a *pro rata* share of accounts, for stores

supplied by the firm of J. & R. Wilson, Inc., to us, on presentation of accounts by said firm, mentioned above, upon payment to us of above subsistence or wages by our attorney, as will be due us from above named vessel.

“We will authorize Mr. Spencer, 1st mate, and Mr. Crawford, chief engr., to check all accounts for us, tho in case of necessity, accounts will be open for inspection by members of the crew.”

This being signed by all of the libelants, was endorsed as follows:

“J. R. Wilson, Inc.: On the above order, I agree to withhold from any payment that may be made by me for subsistence of crew and to pay you on approved bills (by Mr. Spencer and Mr. Crawford) the amount that may be due you for provisions so furnished. Ira S. Lillick, Attorney for above named crew.”

The receiver, in his testimony as to what he did with relation to the “Benowa” states:

“The only action that was taken was to address a letter to the master of the ship, enclosing a notice to the crew advising them that the ‘Benowa’ was in my hands as Receiver, and notifying them that their services were no longer required, and they were ordered to get off the ship.”

The notice was dictated and sent out on April 1, 1921. No payment was made or tendered to the

officers or crew, nor any arrangement made for their subsistence.

On the 27th day of April the following tender in writing [191] was filed in this proceeding:

“Now comes William E. Gerber, Jr., and hereby offers to pay to libelants herein the sum of fifty-six hundred and nine and 20/100 dollars (\$5609.20), being wages due to libelants in accordance with the shipping articles mentioned in the libel herein, up to and including the 17th day of March, 1921, which said sum is herewith deposited with the clerk of this court.

“Said William E. Gerber, Jr., likewise offers to pay to libelants their costs heretofore incurred herein.

“Said William E. Gerber, Jr., likewise offers to furnish to such of libelants as may desire the same, transportation in accordance with said shipping articles.”

On or about May 5, 1921, the “Benowa” was released from the receivership. On May 10th Gerber was substituted as intervenor in place and stead of the Commonwealth of Australia.

On the 27th of April, 1921, the parties hereto and Messrs. Thacher & Wright, appearing for McIntosh-Seymons Corporation, Henry C. Peterson, Inc., and E. C. Genereux, appeared before the Court, and such proceedings were had that an order was entered referred this cause to Francis Krull, United States Commissioner, to take the testimony and report findings and conclusions. Testimony was thereafter taken and returned into this court.

On the 14th day of May, 1921, a decision was filed. On the 16th day of May, upon the suggestion of Thacher & Wright, the matter was reassigned for argument on the 17th of May, at which time appeared Ira S. Lillick, Esq., and Arthur Olson, Esq., appearing for libelants, and Felix Smith, Esq., representing Messrs. Pillsbury, Madison & Sutro, for respondent and substituted intervening libellant, W. E. Gerber, Jr., and Messrs. Thacher & Wright appearing for McIntosh-Seymons Corporation, Henry C. Peterson, Inc., and E. C. Genereux. [192]

It is the contention of the libelants that they are entitled to wages earned under the shipping articles, less amounts paid, either cash, or from the "slop-chest," together with penalty provided by Section 4529, Revised Statutes of the United States, as amended, Compiled Statutes, 8320, while the intervenors and claimant contend that the only liability that should obtain is the amount of wages due on March 17th, that because the financial condition of the claimant "is sufficient cause" to avoid the penalty thus provided.

The contention that the libelants are not entitled to their wages at the time of the discharge of the cargo on March 17th and the statutory penalty thereafter is not well founded. There is no ground for controversy with respect to the wages which were earned and which were due. The provision of the section invoked is:

"Every master or owner who refuses or neglects to make payment in the manner hereinafore mentioned without sufficient cause, shall

pay to the seamen a sum equal to two days' pay for each and every day during which time his delay beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court."

The contention that the penalty is a personam liability and may not be impressed as a preferred lien with the wages is likewise out of harmony with the plain sense of the statute, which provides that pay for delay of payment shall be recoverable as wages in any claim made before the court. It is, in effect, an increase of wages on the failure of the master to promptly pay.

Covert vs. British Brig "Wexford," 3 Fed. 577;

The "Charles L. Baylis," 25 Fed. 862;

And when wages are earned and are due, there is no ground for controversy as to the right to receive payment,—

The "Amazon," 144 Fed. 153. [193]
the only contention being that the inability of the claimant to pay because of lack of funds is "sufficient cause" to avoid the penalty, clearly the intent of the statute is not to hold the wage earner responsible for the financial inability of the ship to meet its wage obligations. Wages are a first and prior charge against the vessel. It would be manifestly unjust, in some instances inhuman, to discharge a seaman without payment of wages, without means of support, excusing a ship from the plain provisions of the statute fixing a penalty for default which in no sense was caused by the seaman. The

seaman is a ward of the Court of Admiralty, and he may not be discharged many miles from his home port without wages and without means of sustenance, and bear the penalty which the statute places upon the ship. The purpose of the statute plainly is that the seaman shall be protected against enforced idleness and nonsubsistence by being required to wait for payment of his wages when he is without fault and no sufficient cause exists other than the financial inability of the ship.

And, likewise, the libelants are entitled to transportation, together with subsistence en route for all such as desire to return to their home port.

The fact that a receiver was appointed for the claimant cannot shift the burden for nonpayment from the ship to the wage-earner, especially where the ship was already in the custody of the Admiralty Court. I know of no case, and none has been called to my attention, where a contrary rule has been announced in this or any other District upon a like state of facts.

A decree may be presented in accordance with this opinion, the vessel sold, the proceeds applied to the payment [194] of the claims of the libelants, and the balance to remain in the registry of the Court, subject to further disposition with relation to any claims which may be decreed against the same.

This decision is to supersede that filed on May 14, 1921, which is hereby expunged from the record.

NETERER,
Judge.

Dated, May 17, 1921.

[Endorsed]: Filed May 17, 1921. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [195]

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, et al.,

Libelants,

vs.

The American Motorship "BENOWA," Her En-
gines, Boilers, Tackle, Machinery, Apparel
and Furniture,

Respondent.

**(Stipulation and Order Amending Name of One of
Libelants.)**

It appearing that by inadvertence the libelant S.
J. Ryan was named "S. J. Wright" in the libel and
all proceedings in the above-entitled case; and it ap-
pearing that the name "S. J. Wright" should be S.
J. Ryan,—

NOW, THEREFORE, IT IS HEREBY STIPU-
LATED and agreed that said libel shall be amended
so that S. J. Ryan shall be substituted in place and
stead of "S. J. Wright."

Dated: San Francisco, May 19th, 1921.

IRA S. LILLICK,

Proctor for Libelants.

PILLSBURY, MADISON & SUTRO,

Proctors for Respondent and Claimant.

It is so ordered.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed May 21, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [196]

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H.
COUNCILL, TIM HARRIGAN, FRANK-
LIN ADREAN, Jr., FRANK GARLOCK,
BIRGER JOHANSEN, FRITZ SHILLING,
AXEL JOHNSON, JOHN LAHTIMEN,
WILLIAM H. CRAWFORD, J. B.
HUGHES, WALTER S. AUSTIN, LEON
A. CARTER, CAMPBELL A. HOBSON, W.
OWENS, W. C. WARD, N. E. AUSTIN,
CHARLES V. SMITH, H. D. WRIGHT,
ROBERT DOUGLE, JOHN LOPEZ,
WILLIAM OVID, S. J. RYAN, G. GAR-
FIELD, and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her En-
gines, Boilers, Tackle, Machinery, Apparel
and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corporation,
tion,

Claimant.

(ANGLO CALIFORNIA TRUST COMPANY, a Corporation,
Corporation,

Substituted Claimant.)

THE COMMONWEALTH OF AUSTRALIA, and
WILLIAM MORRIS HUGHES, Attorney
General of said THE COMMONWEALTH
OF AUSTRALIA, for said THE COMMON-
WEALTH OF AUSTRALIA,

Intervening Libelants.

(W. E. GERBER, Jr.,

Substituted Intervening Libelant.)

(Interlocutory Decree.) [197]

The above-entitled cause, having come on regularly for hearing, and having been heard on the pleadings in the cause, and having been referred to FRANCIS KRULL, United States Commissioner, to take testimony, and the said testimony having been duly taken and returned herein by said commissioner, and the said cause submitted upon said testimony and briefs filed herein, with oral argument thereon by all of the parties appearing herein, and due deliberation being had in the premises, now, in accordance with the opinion heretofore filed herein, on motion of Ira S. Lillick, Esq., proctor for libelants,—

IT IS ORDERED, ADJUDGED AND DECREED that the libelants in the above-entitled action, and each thereof, do have and recover in this ac-

tion against the motorship "Benowa," her engines, machinery, tackle, apparel and furniture, the respective amounts hereinafter first set opposite their respective names, with interest thereon at the rate of seven (7) per cent per annum from the date of the entry of final decree, and a further sum to each of said libelants equal to two days' pay at the rate per day hereinafter second set opposite their respective names, for each and every day from and after the 17th day of March, 1921, until the 17th day of May, 1921.

Names:	First: (Amount due to March 17, 1921.)	Second: (Rate of wages per day to be doubled from March 17, 1921, to date of entry of decree.)
Richard J. Spencer	\$404.85	\$7.42
C. V. Miller	355.20	6.46
R. H. Councill	308.90	5.67
Tim Harrigan	159.30	3.17
Franklin Adrean, Jr.,	129.35	2.83
[198]		
Frank Garlock	155.85	2.83
Birger Johansen	152.80	2.83
Fritz Shilling	139.90	2.83
Axel Johnsson	147.79	2.83
John Lahtimen	146.65	2.83
William H. Crawford	517.13	10.63
J. B. Hughes	303.15	7.42
Walter S. Austin	347.45	6.46
Leon A. Carter	300.60	5.67
Campbell A. Hobson	169.97	3.17
W. Owens	174.15	3.17
W. C. Ward	166.99	3.17

Names:	First: (Amount due to March 17, 1921.	Second: (Rate of wages per day to be doubled from March 17, 1921, to date of entry of decree.)
N. E. Austin	167.03	3.33
Charles V. Smith	123.79	2.50
H. D. Wright	245.03	4.50
Robert Dougle	203.70	3.83
John Lopez	158.31	3.33
William Ovid	114.35	2.33
S. J. Ryan	123.33	2.33
G. Garfield	114.35	2.33
D. W. Davis	229.15	4.17

—together with transportation to the City of Baltimore, Maryland, and subsistence en route for each of the libelants desiring said transportation, together with their costs to be taxed; and,

IT IS FURTHER ORDERED that if the parties hereto cannot agree upon the amount each libelant is entitled to receive, that this computation be, and is hereby, referred to FRANCIS KRULL, Esq., one of the Commissioners of this court, to ascertain the amount due each libelant and report thereon to this

Court with all convenient speed. It is

(Initialed) further decreed that the fund paid into

M. T. D. Court be exhausted before recourse is

had to the vessel, and that this decree

be entered *nunc pro tunc* as of May 17, 1921.

May 25, 1921.

M. T. DOOLING,

District Judge. [199]

[Endorsed]: Receipt of a copy of the within interlocutory decree is hereby admitted this 19th day of May, 1921.

PILLSBURY, MADISON & SUTRO,

Proctors for Substituted Claimant.

Lodged May 21, 1921.

Filed May 25, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 10 Judg. and Decrees, at Page 4701½. [200]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER et al.,

Libelants,

vs.

The American Motorship "BENOWA," Her Engines, etc.,

Respondent.

Affidavit of Walter S. Austin.

State of California,

City and County of San Francisco,—ss.

Walter S. Austin, being first duly sworn, deposes and says: That he now is, and has at all times herein mentioned been, the assistant engineer on the American motorship "Benowa," now lying in the port of San Francisco, that he signed shipping articles on

said vessel at the port of Baltimore on the 21st day of January, 1921, and has been acting as assistant engineer at all times since said date; that said vessel arrived in the port of San Francisco on or about the 28th day of February, 1921, and completed discharging its cargo on or about the 17th day of March, 1921; that at the time of the arrival of said vessel, the members, the officers and the crew demanded fifty per cent of their wages from the master, and the same, nor any part thereof, was not furnished; that thereafter, to wit, on or about the 15th day of March, a libel in the Admiralty Division of this Court was filed, and thereafter, an opinion was given [201] by Judge Neterer, in which he found the officers and the crew entitled to their wages, up to and including the 17th day of March, 1921, and for a further sum to equal two days' pay for each day thereafter that said wages should remain unpaid and until final decree; that the officers and crew thereof have not received such wages, or any part thereof, save and except J. B. Hughes and W. H. Crawford, who have received part payment on account, and that said officers and crew are without funds of any kind whatsoever, except such sums as they have been able to borrow, and if they are forced to leave the ship they have no place to go, or any means whereby they can furnish themselves with necessaries and lodging; that said vessel was not, at the time it was libeled, by said officers and crew, or at any time since released by bond or otherwise by the claimant, or anyone in its behalf.

Affiant further states that said officers and crew of said vessel have used the machinery, equipment and furniture for the purpose of carrying on the necessary work on board said vessel, and to provide heat and lights for themselves, and such lights as are required by law, and that it is necessary to run the machinery for pumping out the bilges and for keeping the machinery and ship in proper condition, and for the safety of the ship.

Affiant further avers that all the provisions on board of said vessel have been purchased by said officers and crew upon their own credit, and that none of said provisions belong to the vessel or the owners thereof.

Affiant further avers that it is the intention of the United States marshal to order the crew of said vessel off the ship, and that if they are ordered off, it will be subject to the perils of the sea, fire and elements, and, [202] therefore, if they are not on board said vessel to protect the interest which they have in said vessel by reason of the unsatisfied decree on file herein, and said vessel should sink or be burned, they would be without sufficient security to satisfy said decree.

WHEREFORE, affiant prays on behalf of himself and the other libelants, that an order of sale of said vessel be made in accordance with the admiralty law and rules of this Court.

WALTER S. AUSTIN.

Subscribed and sworn to before me this 26th day of May, 1921.

[Seal]

C. M. TAYLOR,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed May 26, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [203]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER et al.,

Libelants,

vs.

The American Motorship "BENOWA," Her Engines, Boilers, Tackle, Machinery, Apparel and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corporation,

Claimant.

ANGLO-CALIFORNIA TRUST COMPANY, a Corporation,

Substituted Claimant.)

THE COMMONWEALTH OF AUSTRALIA, and
WILLIAM MORRIS HUGHES, Attorney
General of said THE COMMONWEALTH
OF AUSTRALIA, for said THE COMMON-
WEALTH OF AUSTRALIA,

Intervening Libelants.

(W. E. GERBER, Jr.,

Substituted Intervening Libelant.)

Affidavit of Felix T. Smith.

State of California,

City and County of San Francisco,—ss.

Felix T. Smith, being first duly sworn, deposes and
says:

That he is an attorney at law and a member of the
bar of the above-entitled court, in the employ of
Messrs. [204] Pillsbury, Madison & Sutro, proc-
tors for claimant and intervening libelant in the
above-entitled cause;

That on the 19th day of May, 1921, he received a
letter from Ira S. Lillick, Esq., proctor for libelants
herein, which said letter is hereto attached and
marked Exhibit "A."

That on the 24th day of May, 1921, affiant signed,
on behalf of proctors for claimant and intervening
libelant, and delivered to the clerk of the above-en-
titled court for filing, a consent to the disbursement
of the funds mentioned in said letter; that a copy of
said consent is hereto attached and marked Exhibit
"B"; that the clerk of said court delivered said con-
sent to Arthur Olson, Esq., a member of the bar of
the above-entitled court, in the employ of said proc-

tor for libelants; that affiant does not know what disposition said Olson has made of said consent.

FELIX T. SMITH.

Subscribed and sworn to before me this 26th day of May, 1921.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of
San Francisco, State of California. [205]

Exhibit "A."

IRA S. LILLICK,

Attorney At Law,

908-912 Kohl Building,

San Francisco.

May 19th, 1921.

Felix D. Smith, Esq.,

Standard Oil Bldg.,

San Francisco, Calif.

IN RE: Spencer v. "Benowa."

Dear Sir:

Your letter to me, under date of May 18th, 1921, delivered by messenger at my office at 10:05 this morning, has been received, and I am replying to it immediately, having sent word back by the messenger who delivered it, that your letter required a written reply. This immediate reply is necessitated by your statement that,

"In view of the fact that further time is being taken for the preparation of this decree, it was understood that no penalty should be imposed for any delay subsequent to yesterday. This will give Mr. Olson plenty of time in which to make his computations."

Mr. Olson informs me that you are mistaken if you understood that he stipulated with you that no penalty should be imposed for any delay subsequent to May 17th. He explains to me that such a suggestion was made by the court with reference only to the possibility of your being willing to consent to the immediate payment to the crew of the amount of the so-called tender made by you some time ago, for, if you were willing to do this, it seemed to the Judge that we should, in our turn, be willing to agree that any such decree as might be entered herein, should be entered as of May 17th.

I appreciate the fact that you would like to see the crew paid, and I know that you did express regret that you did not accept the \$5609.20 at the time it was tendered.

I have no wish to seek to take advantage of any disposition upon your part to offer temporary aid to the crew, and in accepting any suggestion that they might be made a partial payment upon the amount due them, by so doing, prejudice your right of appeal. Furthermore, I recognize your right to appeal from such decree as may be entered in this matter, but, in the meantime, feel that in view of the regrettable misunderstandings that have already occurred in this case, [206] neither you nor I should permit our relations to become still further strained through any misconception of what either your office or mine has agreed upon. It is for this reason I am writing you at such length, for Mr. Olson is as positive as you apparently are, in his understanding of what occurred in your

conference with Judge Netterer the other day, when Judge Netterer, you and he discussed the forms of decrees which were presented to the Judge at the Palace Hotel in the Judge's room upon the late afternoon of May 17th.

In order that there may be no possibility of a future difference of opinion between you and Mr. Olson as to how your various discussions may terminate, would it not be well to understand that any stipulations in this matter be reduced to writing?

During to-day a form of decree will be presented to you, with notice that the original is being filed in accordance with the provisions of the rules of the First Division of the District Court of this District, as to the form of which I understand the rules give you the right to object.

I see no way out of the difficulty in which we are over the definite amount payable to the libelants other than to have this difference referred to the Commissioner for determination, unless we can stipulate as to these amounts. In that event, all difficulty would end over the question of delay in entering the decree, for the final decree in the case must be specific in the amount provided to be paid to satisfy it.

Mr. Olson has called my attention to the fact that there may possibly be some question as to the authority of Judge Netterer to sign any decree that may be entered herein, if that decree is signed by Judge *Netter* outside of the District, and, for that reason, it seems to me that we shall have to depend

upon whatever Judge is sitting in Division One of the District Court when the final form of decree, a copy of which will be served upon you today as I have stated, is presented to him for signature.

In order that there may be no further delay, I shall be glad to arrange to meet you at your convenience at the Chambers of the District Judge here, at such time as we may be able to meet him, prior to the expiration of the five days within which, as I understand it, the rule provides that you may object to the form of the decree.

I understand that Judge M. T. Dooling is expected here upon Saturday morning, and in the meantime, under the circumstances, I have no doubt but that Judge W. C. Van Fleet will be willing to take the matter up with us.

Yours sincerely,

IRA S. LILLICK.

ISL:B. [207]

Exhibit "B."

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 595—IN EQUITY.

THE COMMONWEALTH OF AUSTRALIA,
et al.,

Plaintiffs,

W. E. GERBER, Jr.,

Substituted Plaintiff,

vs.

PACIFIC MOTORSHIP COMPANY, a Corporation,
et al.,

Defendants.

Consent to Disbursements of Funds.

The undersigned hereby consent that out of the fund of \$5,609.20 deposited with the Clerk of this Court by the above named plaintiff, April 28, 1921, in the case of *Spencer vs. Benowa*, No. 17,132 in Admiralty, there be paid to each of the libelants the sums set opposite their names in the form of decree lodged herein in said cause May 21, 1921.

This disbursal shall be made and accepted without prejudice to the claim of libelants in said cause for any penalty or other demands asserted by them therein and without prejudice to the right of substituted claimant and intervening libellant therein to appeal from any award that may be made

to said libelants in said regard by any decree entered therein.

Said substituted plaintiff likewise offers to furnish to such libelants as so may desire transportation to Baltimore, Maryland, including berths and subsistence en route.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

Dated May 23, 1921. [208]

[Endorsed]: Receipt of a copy of the within affidavit is admitted this 2d day of June, 1921.

IRA S. LILLICK,

Proctor for Libelants.

Filed Jun. 2, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [209]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER et al.,

Libelants,

vs.

The American Motorship "BENOWA," Her Engines, etc.,

Respondent.

Affidavit of W. E. Gerber, Jr.

State of California,

City and County of San Francisco,—ss.

W. E. Gerber, Jr., being first duly sworn, deposes and says: That he is the intervening libelant in the above-entitled cause; that he has read the affidavit of Walter B. Austin sworn to May 26, 1921, on file herein; that the statement therein made with reference to an opinion given by Judge Neterer is untrue; that two opinions by Judge Neterer are on file in the above-entitled cause; that in the first of said opinion which is entitled "Decision," Judge Neterer held libelants were entitled "to the full amount of their unpaid wage to and including the 17th day of March and to the further sum equal to one day's pay for each and every day from said date until the entry of this decree"; and in the second of said opinions which is entitled "Supplemental Decision," Judge Neterer held that libelants were entitled "to their wages at the time of the discharge of the cargo on March 17th and [210] statutory penalty thereafter"; that in said second opinion Judge Neterer did not fix the amount of the penalty nor the period for which it should run.

That the statement made in said affidavit that the officers and crew thereof have not received such wages or any part thereof is misleading in this: that the amount of such wages has been tendered to each and every one of the libelants and refused by them except libelants Hughes and Crawford and that the same has been deposited in this court.

That the statement therein made that said officers and crew are without funds of any kind whatsoever except what sums as they have been able to borrow is untrue in that said officers and crew have been accorded the privilege of accepting said wages so tendered and deposited without prejudice to their other claims herein.

That the statement therein made that if said officers and crew are forced to leave the ship they have no place to go or any means by which they could furnish themselves with necessities and lodging is untrue in that affiant has offered to furnish said officers and crew transportation to Baltimore, Maryland, their home port, in accordance with shipping articles under which they shipped, together with berths and subsistence en route.

With reference to the statement therein made in regard to the use of the machinery, equipment and furniture of said motorship "Benowa," affiant state that said motorship has been used by said officers and crew as a home during the pendency of this action and against the protests, objections and orders of the parties interested in said vessel, and the receiver heretofore appointed by this Court; that in their occupation of said vessel said officers and crew have used for [211] their own purposes the machinery and equipment of said vessel and consumed such provisions as were on board and have consumed fuel oil and other stores on board; that all of the work necessary to be done for the proper preservation and care of said vessel in port can be done by one watchman, assisted when

necessary by an engineer; that the motorship "Babinda," a sister ship of the motorship "Benowa" has been kept in this port by one watchman, assisted by an engineer as above set forth, since March 31, 1921; that said vessel has been so kept under seizure by the marshal of this court under libels heretofore filed herein and under the supervision of the receiver heretofore appointed by this court; that the motorship "Cethana," a similar vessel, has been likewise so maintained during said period; that during their occupancy of said vessel since the filing of the libel herein, said officers and crew have not maintained the same properly, and have themselves admitted that fact, stating that they were unable to do so by reason of the fact that they did not have the proper materials.

Referring to the ownership of the provisions on board said vessel, affiant states that at the time of the filing of the libel herein there were provisions on board said vessel belonging to the owners thereof, some of which provisions have since been consumed by said officers and crew, but that affiant does not know whether or not any of said provisions belonging to the owners of said vessel remain now on board said vessel; that all of the stores and other property on board said vessel other than the provisions, are the property of the owners of said vessel and are being used by said officers and crew; that whatever provisions have been purchased since the filing of the libel herein were not purchased by said officers and crew upon their own credit, but upon

the strength of the contract heretofore filed herein.
[212]

With reference to the statement therein made that if the crew are ordered off said vessel it will be subject to the perils of the sea, fire and elements, affiant states that said vessel is safe and sound in the port of San Francisco and subject to no perils of the sea whatever; that during their occupancy of said vessel since the filing of said libel, the said crew have stated that several fires have occurred thereon; that said fires occurred according to said statement of said crew solely by reason of the use by said crew of the machinery and equipment of said vessel; that if said crew are removed from said vessel the same will be subject to no perils of fire whatever; that during their occupancy of said vessel since the filing of said libel, said crew have permitted certain portions of the equipment of said vessel to be exposed to the elements; that if said crew are removed from said vessel, the marshal of this court and the watchman can easily prevent any damage to the vessel or its equipment by the elements.

That the above-entitled cause has been pending since March 15, 1921, during all of which period libelants have been occupying said vessel as a home; that during all of said period no motion has at any time been made by libelants for the sale of the vessel; that since May 17, 1921, the marshal of this court has given libelants notice in various ways that they should not remain on board said vessel; that prior to the giving of the notice of

motion for interlocutory sale herein, said marshal advised libelants definitely that they must remove from said vessel by noon May 26, 1921; that said notice was served at ten o'clock A. M., May 26, 1921; that libelants have stated that they would not ask for a sale of the vessel so long as they were allowed to occupy the same as a home.

That at the present time a serious depression exists [213] in the business of the carriage of passengers and freight by sea and a strike exists among seamen and other persons employed on vessels, at the present time; that by reason of the foregoing circumstances, a vessel sold at the present time would realize a sum far less than its real value.

That affiant is the assignee of a mortgage upon said vessel for the principal sum of three hundred thirty-four thousand dollars (\$334,000), with interest at six per cent per annum from February 24, 1920; that there are numerous other claimants and holders of maritime liens upon said vessel and that it is not desirable and advisable from the point of view of the persons holding liens upon said vessel that she be sold at the present time.

That the owner of said vessel, Anglo-California Trust Company, holds the title thereto merely as trustee and has no funds whatever available as such trustee to protect its title thereto as such trustee.

W. E. GERBER, Jr.

Subscribed and sworn to before me this 27th day of May, 1921.

[Notary Seal]

FRANK L. OWEN,
Notary Public in and for the City and County of
San Francisco, State of California. [214]

[Endorsed]: Receipt of a copy of the within affidavit is admitted this 2d day of June, 1921.

IRA S. LILLICK,
Proctor for Libelants.

Filed Jun. 2, 1921. W. B. Maling, Clerk. By
C. M. Taylor, Deputy Clerk. [215]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. RYAN, G. GARFIELD, and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," her Engines, Boilers, Tackle, Machinery, Apparel and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corporation,

Claimant.

(ANGLO-CALIFORNIA TRUST COMPANY, a Corporation,

Substituted Claimant.)

THE COMMONWEALTH OF AUSTRALIA, and
WILLIAM MORRIS HUGHES, Attorney
General of said THE COMMONWEALTH
OF AUSTRALIA, for said THE COMMON-
WEALTH OF AUSTRALIA,

Intervening Libelants.

(W. E. GERBER, Jr.,

Substituted Intervening Libelant.)

Final Decree.

The above-entitled cause, having come on regularly for hearing, and having been heard on the [216] pleadings in the cause, and having been referred to Francis Krull, United States Commissioner, to take testimony, and the said testimony having been duly taken and returned herein by said commissioner, and the said cause submitted upon said testimony and briefs filed herein, with oral argument thereon by all of the parties appearing herein, and due deliberation being had in the premises, now, in accordance with the opinion heretofore filed herein, on motion of Ira S. Lillick, Esq., proctor for libelants,—

IT IS ORDERED, ADJUDGED AND DECREED that the libelants in the above-entitled action, and each thereof, do have and recover in this action against the motorship “BENOWA,” her en-

gines, machinery, tackle, apparel and furniture, the respective amounts hereinafter set opposite their respective names, with interest thereon at the rate of seven (7) per cent per annum from the 17th day of May, 1921:

Richard J. Spencer.....	\$1310.09
C. V. Miller.....	1143.32
R. H. Councill.....	1000.64
Tim Harrigan	546.04
Franklin Adrean, Jr.	474.61
Frank Garlock.....	501.11
Birger Johansen	498.06
Fritz Shilling	485.16
Axel Johnsson	493.05
John Lahtimen	491.91
William H. Crawford	1296.86
J. B. Hughes	905.24
Walter S. Austin	1135.57
Leon A. Carter	992.34
Campbell A. Hobson	556.71
W. Owens	560.89
W. C. Ward	553.73
N. E. Austin	573.29
Charles V. Smith	428.79
H. D. Wright	794.03
Robert Dougle	670.96
John Lopez	564.57
William Ovid	398.61
S. J. Ryan	407.59
G. Garfield	398.61
D. W. Davis	737.89

together with transportation to the City of Baltimore, [217] Maryland, and subsistence en route for each of the libelants save and except J. B. Hughes and William H. Crawford who have heretofore received said transportation and an allowance for subsistence, and if said transportation and subsistence are not furnished to said libelants upon satisfaction of the foregoing provisions of this decree that in lieu thereof each of said libelants shall receive the amount set opposite their respective names, to wit:

Richard J. Spencer	\$175.66
C. V. Miller	175.66
R. H. Councill	175.66
Tim Harrigan	168.77
Franklin Adrean, Jr.	168.77
Frank Garlock	168.77
Birger Johansen	168.77
Fritz Shilling	168.77
Axel Johnsson	168.77
John Lahtimen	168.77
Walter S. Austin	175.66
Leon A. Carter	175.66
Campbell A. Hobson	168.77
W. Owens	168.77
W. C. Ward	168.77
N. E. Austin	175.66
Charles V. Smith	168.77
H. D. Wright	175.66
Robert Dougle	168.77
John Lopez	168.77
William Ovid	168.77

S. J. Ryan168.77

G. Garfield168.77

D. W. Davis175.66

IT IS FURTHER ORDERED that if any of said libelants shall have furnished their own transportation and subsistence to said Baltimore, Maryland, prior to payment and/or satisfaction of this decree, that he shall be paid the sum last hereinabove set opposite his name in addition to the amounts hereinabove set forth.

IT IS FURTHER ORDERED that unless this decree be satisfied, or an appeal be taken therefrom within the time provided by law, and the rules of this court, that the motorship "BENOWA," her engines, tackle, machinery and appurtenances, [218] be sold, the proceeds applied to the payment of the claims of the libelants, and the balance to remain in the registry of this court.

IT IS FURTHER ORDERED that the amount heretofore paid into court be exhausted before recourse is had to the vessel, or the proceeds from the sale of said vessel; and that libelants recover their costs to be taxed.

Dated June 2, 1921.

M. T. DOOLING,
District Judge.

[Endorsed]: Lodged May 28. Filed Jun. 2, 1921.
W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 10 Judg. and Decrees, at Page
491. [219]

In the Southern Division of the District Court of the
United States for the Northern District of Cali-
fornia, First Division.

No. 17,103.

PACIFIC STEAM NAVIGATION COMPANY,
a Corporation,

Libelant,

vs.

The American Motorship "CETHANA," Her En-
gines, Tackle, Apparel and Furniture,
Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,103.**

1921.

March 5. Filed libel of Steam Navigation Com-
pany, for the sum of \$62,500.00.

Issued monition, returnable March 15th,
1921.

**GOODFELLOW, EELLS, MOORE &
ORRICK, Proctors.**

1921.

March 10. Filed libel in intervention of McIntosh
& Seymour Corporation, for the sum
of \$3118.25.

Issued monition, returnable March 22d,
1921.

THACHER & WRIGHT, Proctors.

[220]

1921.

- March 11. Filed libel in intervention of Henry Rothschild and F. A. Bartlett, constituting a copartnership doing business under the firm name and style of Rothschild & Company, for the sum of \$1891.66.

Issued monition, returnable March 22d, 1921.

THACHER & WRIGHT, Proctors.

1921.

- March 14. Filed libel in intervention of R. C. Griffith, doing business under the name and style of R. C. Griffith Company, for the sum of \$160.75.

Issued monition, returnable March 22d, 1921.

THACHER & WRIGHT, Proctors.

1921.

- March 14. Filed libel in intervention of California Stevedore & Ballast Company, for the sum of \$291.40.

Issued monition, returnable March 22d, 1921.

HARRISON S. ROBINSON, Esq., and
HARRY L. PRICE, Esq., Proctors.
PILLSBURY, MADISON & SUTRO.
Proctors for Respondent and Claimant.

This cause is still pending. [221]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—(No. 17,103).

PACIFIC STEAM NAVIGATION CO., a Corporation,

Libelant,

vs.

The American Motorship "CETHANA," Her Engines, Tackle, Apparel and Furniture,

Respondent.

Libel in Rem—No. 17,103.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States, for the Northern District of California:

The libel of PACIFIC STEAM NAVIGATION CO., a corporation, against the American motorship "CETHANA," her engines, tackle, apparel and furniture, in a cause of contract, civil and maritime, respectfully shows:

I.

That the libelant Pacific Steam Navigation Co. is and at all the times herein mentioned was a corporation duly organized, incorporated and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland.

II.

That said motorship "Cethana" is and at all the times herein mentioned was owned by Pacific Motor-

ship Company (a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having a duly authorized [222] agent in the Port of San Francisco, to wit, R. J. Ringwood); that the Anglo-California Trust Co. (a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the city and county of San Francisco in said State) claims some interest in said vessel the nature and extent of which is to libelant unknown.

III.

That libelant is informed and believes and therefore alleges that at various times during the course of recent voyages of said motorship "Cethana" in and about the west coast of South America and the ports thereof, it became necessary to enable said vessel proceed on her intended voyage to obtain money for supplies, repairs, for crew's wages and other necessary disbursements; and the master and owners of said vessel, being without funds to pay for the same, libelant, upon their request, advanced and paid out to them, for the use of said vessel, for said supplies, repairs, wages and disbursements, at various ports and places upon the west coast of South America, divers sum of money, the total of which cannot at this time be definitely ascertained, but which, according to libelant's best information and belief, is not less than sixty-two thousand five hundred (62,500) dollars, which said advances were to be repaid to libelant upon the return of said vessel to her home port, to wit, the port of San Francisco,

in the Northern District of California. That libelant cannot at this time state the particular times or places or the particular amounts, when or at which port, or in what amount, said advances were made, and therefore prays leave to amend this libel by substituting for said times and places, and for said sum above mentioned, the accurate [223] times and places of payment and the accurate amount of said advances when the same shall have been ascertained.

IV.

That after the making of said advances by this libelant said vessel sailed from ports on the west coast of South America to the port of San Francisco. That upon its arrival at said port of San Francisco this libelant demanded from the owners of said vessel the amount so advanced as aforesaid, but said owners declined and refused to pay the same, and that no part of said sum of sixty-two thousand five hundred (62,500) dollars has been repaid to libelant.

V.

That said motorship "Cethana" now is within said port of San Francisco, and within the Northern District of California.

VI.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this court.

WHEREFORE, this libelant prays that process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against said motorship "Cethana," her engines, tackle, apparel and furni-

ture, and that all persons claiming any interest therein may be cited to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree the payment of said sum of sixty-two thousand five hundred (62,500) dollars, with interest thereon, and with costs, and that said motorship "Cethana" may be condemned and sold to pay the same, and that [224] libelant have such relief and redress as the court is competent to give in the premises.

GOODFELLOW, EELLS, MOORE & ORRICK,
Proctors for Libelant. [225]

State of California,
City and County of San Francisco,—ss.

W. H. Orrick, being first duly sworn, deposes and says:

That he is and at all the times herein mentioned was one of the proctors for the libelant in the above-entitled action; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are herein stated on information or belief, and as to those matters that he believes it to be true.

That affiant makes this verification for the reason that libelant is a foreign corporation, and all of its officers reside out of the State of California, and the city and county of San Francisco, in the Northern District thereof, in which said city affiant has his office. That affiant cannot state with more particularity the foregoing libel at this time for the reason

that affiant is proceeding substantially by cable and telegraphic advices from libelant.

W. H. ORRICK.

Subscribed and sworn to before me this 5th day of March, 1921.

[Notary Seal]

H. L. LANFAR,

Notary Public in and for the City and County of San Francisco, State of California.

Let process be issued as prayed for.

Judge of the United States District Court for the Northern District of California. [226]

Interrogatories to be Propounded to Claimant Which It is Required to Answer Under Oath.

FIRST INTERROGATORY:

What is the name of the master of the motorship "Cethana," and for what period last past has he been such master?

SECOND INTERROGATORY:

Did you or such master at any time request libelant to make advances to the motorship "Cethana," while said motorship was engaged in voyages along the west coast of South America? If so, state when.

THIRD INTERROGATORY:

Did you or the master of said motorship "Cethana" receive from libelant advances for account of such motorship "Cethana" while said motorship was engaged in voyages along the west coast of South America? If so, state the date or dates when such advances were received, the port or ports in which such advances were received, and the particular amounts thereof.

FOURTH INTERROGATORY:

What is the total amount to date of the advances made by libelant to the motorship "Cethana"?

FIFTH INTERROGATORY:

State the purposes for which and the manner in which said advances were expended by you or said master of the motorship "Cethana."

GOODFELLOW, EELLS, MOORE & ORRICK.

Proctors for Libelant.

[Endorsed]: Filed Mar. 5, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [227]

In the Southern Division of the District Court of the United States, for the Northern District of California, First Division.

No. 17,104.

PACIFIC STEAM NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

The American Motorship "BABINDA," Her Engines, Tackle, Apparel and Furniture,
Respondent.

Statement of Clerk U. S. District Court as Per Stipulation and Order—Case No. 17,104.

1921.

March 5. Filed libel of Pacific Steam Navigation Company, for the sum of \$62,500.00.

Issued monition, returnable March 15,
1921.

GOODFELLOW, EELLS, MOORE &
ORRICK, Proctors.

1921.

March 10. Filed libel in intervention of McIntosh
& Seymour Corporation, for the sum
of \$1,047.00.

Issued monition, returnable March 22d,
1921.

THACHER & WRIGHT, Proctors.
[228]

1921.

March 14. Filed libel in intervention of United
Engineering Company, a corporation,
for the sum of \$544.39.

Issued monition, returnable March 22d,
1921.

HARRISON S. ROBINSON, Esq., and
HARRY L. PRICE, Esq., Proctors.

Filed libel in intervention of California
Stevedore and Ballast Company, for
the sum of \$168.94.

Issued monition, returnable March 22d,
1921.

HARRISON S. ROBINSON, Esq., and
HARRY L. PRICE, Esq., Proctors.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent and Claim-
ant.

This cause is still pending. [229]

In the Southern Division of the District Court of
the United States, for the Northern District of
California, First Division.

IN ADMIRALTY—(No. 17,104).

PACIFIC STEAM NAVIGATION COMPANY, a
Corporation,

Libelant,

vs.

The American Motorship "BABINDA," Her En-
gines, Tackle, Apparel and Furniture,
Respondent.

Libel in Rem—No. 17,104.

To the Honorable MAURICE T. DOOLING, Judge
of the District Court of the United States, for
the Northern District of California:

The libel of Pacific Steam Navigation Co.,
a corporation, against the American motorship
"Babinda," her engines, tackle, apparel and fur-
niture, in a cause of contract, civil and maritime,
respectfully shows:

I.

That the libelant Pacific Steam Navigation Co., is
and at all the times herein mentioned was a cor-
poration duly organized, incorporated and existing
under and by virtue of the laws of the United King-
dom of Great Britain and Ireland.

II.

That said motorship "Babinda" is and at all the

times herein mentioned was owned by Pacific Motorship Company, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having a duly authorized agent in the Port of San Francisco, to wit, R. J. Ringwood. [230] That Anglo-California Trust Co., a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the city and county of San Francisco, in said State, claims some interest in said vessel, the nature and extent of which is to libelant unknown.

III.

That libelant is informed and believes and therefore alleges that at various times during the course of recent voyages of said motorship "Babinda" in and about the west coast of South America and the ports thereof, it became necessary to enable said vessel to proceed on her intended voyage to obtain money for supplies, repairs, for crew's wages and other necessary disbursements; and the master and owners of said vessel, being without funds to pay for the same, libelant, upon their request, advanced and paid out to them, for the use of said vessel, for said supplies, repairs, wages and disbursements, at various ports and places upon the west coast of South America, divers sums of money, the total of which cannot at this time be definitely ascertained, but which, according to libelant's best information and belief, is not less than sixty-two thousand five hundred (62,500) dollars, which said advances were to be repaid to libelant upon the return of said

vessel to her home port, to wit, the port of San Francisco, in the Northern District of California. That libelant cannot at this time state the particular times or places or the particular amounts, when or at which port, or in what amount, said advances were made, and therefore prays leave to amend this libel by substituting for said times and places, and for said sum above mentioned, the accurate times and places [231] of payment and the accurate amount of said advances when the same shall have been ascertained.

IV.

That after the making of said advances by this libelant said vessel sailed from ports on the west coast of South America to the port of San Francisco. That upon its arrival at said port of San Francisco this libelant demanded from the owners of said vessel the amount so advanced as aforesaid, but said owners declined and refused to pay the same, and that no part of said sum of sixty-two thousand five hundred (62,500) dollars has been repaid to libelant.

V.

That said motorship "Babinda" now is within said port of San Francisco, and within the Northern District of California.

VI.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this court.

WHEREFORE, this libelant prays that process in due form of law, according to the course of this

Honorable Court in causes of admiralty and maritime jurisdiction, may issue against said motorship "Babinda," her engines, tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree the payment of said sum of sixty-two thousand five hundred (62,500) dollars, with interest thereon, and with costs, and that said motorship [232] "Babinda" may be condemned and sold to pay the same, and that libelant have such relief and redress as the Court is competent to give in the premises.

GOODFELLOW, EELLS. MOORE & OR-
RICK,

Proctors for Libelant. [233]

State of California,

City and County of San Francisco,—ss.

W. H. Orrick, being first duly sworn, deposes and says:

That he is and at all the times herein mentioned was one of the proctors for the libelant in the above-entitled action; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

That affiant makes this verification for the reason that libelant is a foreign corporation, and all of its officers reside out of the State of California, and the city and county of San Francisco, in the Northern District thereof, in which said city affiant has his

office. That affiant cannot state with more particularity the foregoing libel at this time for the reason that affiant is proceeding substantially by cable and telegraphic advices from libelant.

W. H. ORRICK.

Subscribed and sworn to before me this 5th day of March, 1921.

[Notary Seal]

H. L. LANFAR,

Notary Public in and for the City and County of San Francisco, State of California.

Let process be issued as prayed for.

Judge of the United States District Court for the Northern District of California. [234]

**Interrogatories to be Propounded to Claimant Which
It is Required to Answer Under Oath.**

FIRST INTERROGATORY:

What is the name of the master of the motorship "Babinda," and for what period last past has he been such master?

SECOND INTERROGATORY:

Did you or such master at any time request libelant to make advances to the motorship "Babinda," while said motorship was engaged in voyages along the west coast of South America? If so, state when.

THIRD INTERROGATORY:

Did you or the master of said motorship "Babinda" receive from libelant advances for account of such motorship "Babinda" while said motorship was engaged in voyages along the west coast of South America? If so, state the date or

dates when such advances were received, the port or ports in which such advances were received, and the particular amounts thereof.

FOURTH INTERROGATORY:

What is the total amount to date of the advances made by libelant to the motorship "Babinda"?

FIFTH INTERROGATORY:

State the purposes for which and the manner in which said advances were expended by you or said master of the motorship "Babinda."

GOODFELLOW, EELLS, MOORE & OR-
RICK,

Proctors for Libelant.

[Endorsed]: Filed Mar. 5, 1921. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [235]

In the Southern Division of the District Court of
the United States, for the Northern District of
California, First Division.

No. 17,116.

McINTOSH & SEYMOUR CORPORATION, a
Corporation,

Libelant,

vs.

American Motorship "BENOWA," Her Engines,
Tackle, Apparel and Furniture, etc.,
Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,116.**

1921.

March 10. Filed libel of McIntosh & Seymour Corporation, for the sum of \$3,112.25.

Issued monition, returnable March 22d,
1921.

THACHER & WRIGHT, Proctors.

1921.

March 14. Filed libel in intervention of Henry C. Peterson, Incorporated, a corp., for the sum of \$391.10.

Issued monition, returnable March 22d,
1921.

THACHER & WRIGHT, Proctors.
[236]

1921.

March 14. Filed libel in intervention of E. C. Genereaux, for the sum of \$3,226.91.

Issued monition, returnable March 22d,
1921.

THACHER & WRIGHT, Proctors.

1921.

March 16. Filed libel in intervention of Pacific Steam Navigation Company, a corporation for the sum of \$5,000.00.

Issued monition, returnable March 22d,
1921.

GOODFELLOW, EELLS, MOORE &
ORRICK, Proctors.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent and Claim-
ant.

This cause is still pending. [237]

In the Southern Division of the United States Dis-
trict Court for the Northern District of
California, First Division.

IN ADMIRALTY—(No. 17,116.)

McINTOSH & SEYMOUR CORPORATION, a
Corporation,

Libelant,

vs.

American Motorship "BENOWA," Her Engines,
Tackle, Apparel and Furniture, etc.,
Respondent.

**Libel in Rem for Supplies, Services and Repairs—
No. 17,116.**

To the Honorable M. T. DOOLING, Judge of the
District Court of the United States for the
Northern District of California.

The libel of McIntosh & Seymour Corporation
against the motorship "Benowa," her engines,
tackle, apparel and furniture, etc., and against all
persons intervening for their interest therein, in a

cause of contract, civil and maritime, alleges as follows:

I.

That the libelant herein is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York.

II.

That between July 1, 1919, and January 31, 1920, said intervening libelant, at the request of the owners of said M. S. "Benowa" performed repairs and rendered services and [238] furnished supplies on said M. S. "Benowa," which repairs and services were of the reasonable value of Three Thousand One Hundred & Twelve (\$3,112.25) Dollars Twenty-five Cents; that no part of said sum has been paid and the same is due and owing to libelant.

III.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, and the said motorship is now in the port of San Francisco, and within the jurisdiction of this Court.

WHEREFORE, the libelant prays that process in due form of law and according to the practice of this Honorable Court, may issue against the said motorship "Benowa," her engines, tackle, apparel and furniture, all persons claiming any right, title or interest therein may be cited to appear and to answer, upon oath, all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of the amount so due

to the libelant, with costs, and that the libelant may have such other further relief as in law and justice it may be entitled to receive.

THACHER & WRIGHT,
Proctors for Libelant. [239]

State and Northern District of California,
City and County of San Francisco,—ss.

C. G. Cox, being first duly sworn, on oath deposes and says:

That he is the sole representative and agent in said city and county of San Francisco of said intervening libelant; that he has read the foregoing libel, knows the contents thereof, and that the same is true according to the best of his knowledge, information and belief.

C. G. COX.

Subscribed and sworn to before me this 10th day of March, 1921.

[Notary Seal]

MURIEL ATHERTON RUSSELL,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Mar. 10, 1921. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [240]

Monition—Original Libel 17,116.

Northern District of California,—ss.

The President of the United States of America, to
the Marshal of the United States for the North-
ern District of California, GREETING:

WHEREAS, a libel hath been filed in the South-

ern Division of the United States District Court for the Northern District of California, First Division, on the 10th day of March, in the year of our Lord one thousand nine hundred and twenty-one, by McIntosh & Seymour Corporation, against the Am. motorship "Benowa," her tackle, apparel and furniture, in a cause of action for supplies, etc., in the sum of \$3,112.25, civil and maritime, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said vessel, her tackle, etc., may for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libelant.

YOU ARE THEREFORE HEREBY COMMANDED to attach the said vessel, her tackle, etc., and to retain the same in your [241] custody until the further order of the Court respecting the same and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held in and for the Northern District of California, on the 22d day of March, A. D. 1921, at 10 o'clock in the forenoon of the same day if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim

for the same, and to make their allegations on that behalf.

And what you shall have done in the premises do you then and there make return thereof, together with this writ.

WITNESS the Hon. MAURICE T. DOOLING, Judge of said Court, at the City and County of San Francisco, in the Northern District of California, this 10th day of March in the year of our Lord, one thousand nine hundred and twenty-one.

[Seal]

WALTER B. MALING,

Clerk.

By Lyle S. Morris,

Deputy Clerk.

THATCHER & WRIGHT,

Proctor for Libellant. [242]

**Marshal's Return to Monition (Original Libel
17,116).**

In obedience to the within monition, I attached the Am. motorship "Benowa," etc., therein described, on the 10th day of March, 1921, off *Miggs Wharf*, San Francisco, Cal., and have given due notice to all persons claiming the same that this Court will, on the 22d day of March, 1921 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein named vessel and at the same time and place handed to and left a true and certified copy of the within monition with Wm. C. W. Renny, captain of said vessel; and whom I

found in charge thereof (no keeper placed in charge).

J. B. HOLOHAN,
United States Marshal.

By I. W. Grover,
Deputy.

San Francisco, Cal., March 10th, 1921.

I hereby return that I placed keeper in charge of the Am. motorship "Benowa," etc., at California City on March 12, 1921.

J. B. HOLOHAN,
U. S. Marshal.
By Frank J. Ralph,
Deputy.

[Endorsed]: Filed Mar. 15, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [243]

In the Southern Division of the District Court of
the United States, for the Northern District of
California, First Division.

IN ADMIRALTY—No. 17,116.

McINTOSH & SEYMOUR CORPORATION, a
Corporation,

Libelant,

vs.

The American Motorship "BENOWA," Her En-
gines, Tackle, Apparel and Furniture,
Respondent.

PACIFIC STEAM NAVIGATION CO., a Corporation,

Intervening Libelant,

vs.

The American Motorship "BENOWA," Her Engines, Tackle, Apparel and Furniture,
Respondent.

**Intervening Libel in Rem of Pacific Steam
Navigation Co.—No. 17,116.**

To the Honorable MAURICE T. DOOLING, Judge
of the District Court of the United States, for
the Northern District of California:

The intervening libel of Pacific Steam Navigation Co., a corporation, against the American motorship "Benowa," her engines, tackle, apparel and furniture, in a cause of contract, civil and maritime, respectfully shows:

I.

That the intervening libelant Pacific Steam Navigation [244] Co. is and at all times herein mentioned was a corporation duly organized, incorporated and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland.

II.

Said motorship "Benowa" is and at all the times herein mentioned was owned by Pacific Motorship Company (a corporation duly organized and existing under and by virtue of the laws of the State of Delaware).

III.

That libelant is informed and believes and therefore alleges that at various times during the course of recent voyages of said motorship "Benowa" in and about the west coast of South America and the ports thereof, it became necessary to enable said vessel to proceed on her intended voyage to obtain money for supplies, repairs, for crew's wages and other necessary disbursements; and the master and owners of said vessel, being without funds to pay for the same, libelant, upon their request, advanced and paid out to them, for the use of said vessel, for said supplies, repairs, wages and disbursements, at various ports and places upon the west coast of South America, the sum of five thousand (5,000) dollars, which said advances were to be repaid to libelant upon the return of said vessel to her home port, to wit, the port of San Francisco, in the Northern District of California. That libelant cannot at this time state the particular times or places, when or at which ports, said advances were made, and therefore prays leave to amend this libel by substituting for said times and places the accurate times and places of payment of said advances when the same shall have been ascertained. [245]

IV.

That after the making of said advances by this libelant said vessel sailed from ports on the west coast of South America to the port of San Francisco. That upon its arrival at said port of San Francisco this libelant demanded from the owners of said vessel the amount so advanced as aforesaid,

but said owners declined and refused to pay the same, and that no part of said sum of five thousand (\$5,000) dollars has been repaid to libelant.

V.

That said motorship "Benowa" now is within said port of San Francisco, and within the Northern District of California, and within the custody of the marshal of this Court.

VI.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this court.

WHEREFORE, this libelant prays that it may be allowed to intervene in the above-entitled cause and that process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against said motorship "Benowa," her engines, tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree the payment of said sum of five thousand (5,000) dollars, with interest thereon, and with costs, and that said motorship "Benowa" may be condemned and sold to pay the same, and that [246] libelant have such relief and redress as the court is competent to give in the premises.

GOODFELLOW, EELLS, MOORE &
ORRICK,

Proctors for Libelant. [247]

State of California,
City and County of San Francisco,—ss.

W. H. Orrick, being first duly sworn, deposes and says:

That he is and at all the times herein mentioned was one of the proctors for the libelant in the above-entitled action; that he has read the foregoing libel and knows the contents thereof; that the same is true to the best of his knowledge, information and belief.

That affiant makes this verification for the reason that libelant is a foreign corporation, and all of its officers reside out of the State of California, and the City and County of San Francisco, in the Northern District thereof, in which said city affiant has his office. That affiant cannot state with more particularity the foregoing libel at this time for the reason that affiant is proceeding substantially by cable and telegraphic advices from libelant.

W. H. ORRICK.

Subscribed and sworn to before me this 15th day of March, 1921.

[Notary Seal]

H. L. LANFAR,

Notary Public in and for the City and County of
San Francisco, State of California.

Let process be issued as prayed for.

Judge of the United States District Court, for the
Northern District of California. [248]

**Interrogatories Propounded to Claimant Which It
is Required to Answer Under Oath.**

FIRST INTERROGATORY:

What is the name of the master of the motorship "Benowa," and for what period last past has he been such master?

SECOND INTERROGATORY:

Did you or such master at any time request libelant to make advances to the motorship "Benowa," while said motorship was engaged in voyages along the west coast of South America? If so, state when.

THIRD INTERROGATORY:

Did you or the master of said motorship "Benowa" receive from libelant advances for account of such motorship "Benowa" while said motorship was engaged in voyages along the west coast of South America? If, so, state the date or dates when such advances were received, the port or ports in which such advances were received, and the particular amounts thereof.

FOURTH INTERROGATORY:

State the purpose for which and the manner in which said advances were expended by you or said master of the motorship "Benowa."

**GOODFELLOW, EELLS, MOORE &
ORRICK,**

Proctors for Libelant.

[Endorsed]: Filed Mar. 16, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [249]

**(Monition—Intervening Libel of Pacific Steam
Navigation Co.—No. 17,116.)**

Northern District of California,—ss.

The President of the United States of America, to
the Marshal of the United States for the North-
ern District of California, GREETING:

WHEREAS, a libel in intervention hath been
filed in the Southern Division of the United States
District Court for the Northern District of Califor-
nia, First Division, on the 16th day of March in
the year of our Lord one thousand nine hundred
and twenty-one, by Pacific Steam Navigation Com-
pany, intervenor, against the Am. motorship
“Benowa,” her tackle, apparel and furniture, in a
cause of money advanced, \$5,000.00, civil and mari-
time, for the reasons and causes in the said libel
mentioned and praying the usual process and moni-
tion of the said court in that behalf to be made, and
that all persons interested in the said vessel, her
tackle, etc., may be cited in general and special to
answer the premises, and all proceedings being had
that the said vessel, her tackle, etc., may for the
causes in the said libel mentioned, be condemned
and sold to pay the demands of the libelant.

YOU ARE THEREFORE HEREBY COM-
MANDED to attach the said vessel, her tackle, etc.,
and to retain the same in your [250] custody until
further order of the Court respecting the same and
to give due notice to all persons claiming the same,
or knowing or having anything to say why the same
should not be condemned and sold pursuant to the

prayer of the said libel, that they be and appear before the said court, to be held in and for the Northern District of California, on the 22d day of March, A. D. 1921, at 10 o'clock in the forenoon of the same day if that day shall be a day of jurisdiction, otherwise on the next day or jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf.

And what you shall have done in the premises do you then and there make return thereof, together with this writ.

WITNESS the Honorable MAURICE T. DOOLING, Judge of said Court, at the city and county of San Francisco, in the Northern District of California, this 16th day of March, in the year of our Lord, one thousand nine hundred and twenty-one.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

GOODFELLOW, EELLS, MOORE & ORRICK,

Proctors for Libelant. [251]

Marshal's Return to Monition (Intervening Libel of Pacific Steam Navigation Co.—No. 17,116.)

In obedience to the within monition, I attached the American ship "Benowa," therein described, on the 16th day of March, 1921, and have given due notice to all persons claiming the same that this Court will, on the 22d day of March, 1921 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and con-

demnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein named motorship "Benowa" and placed a keeper in charge thereof, at California City, Cal.

J. B. HOLOHAN,
United States Marshal.
By Frank J. Ralph,
Deputy.

San Francisco, Cal., March 17th, 1921.

[Endorsed]: Filed Mar. 17, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [252]

In the Southern Division of the District Court of
the United States, for the Northern District of
California, First Division.

No. 17,117.

WEST, ELLIOTT & GORDON, a Corporation,
Libelant,

vs.

The American Motorship "CETHANA," Her En-
gines, Boilers, Machinery, Tackle, Apparel
and Furniture,

Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,117.**

1921.

March 11. Filed libel of West, Elliott & Gordon, a corporation, for the sum of \$552.58.
Issued monition, returnable March 22d, 1921.

IRA S. LILLICK, Proctor.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent and Claimant.

This cause is still pending. [253]

In the Southern Division of the District Court of the United States, for the Northern District of California, First Division.

No. 17,118.

WEST, ELLIOTT & GORDON, a Corporation,
Libelant,

vs.

The American Motorship "BABINDA," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,

Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,118.**

1921.

March 11. Filed libel of West, Elliott & Company,
a corp., for the sum of \$1422.12.

Issued monition, returnable March 22d,
1921.

IRA S. LILLICK, Esq., Proctor.

PILLSBURY, MADISON & SUTRO,

Proctors for Respondent and Claim-
ant.

This cause is still pending. [254]

In the Southern Division of the District Court of
the United States, for the Northern District of
California, First Division.

No. 17,119.

WEST, ELLIOTT & GORDON, a Corporation,
Libelant,

vs.

The American Motorship "BENOWA," Her En-
gines, Boilers, Machinery, Tackle, Apparel
and Furniture,

Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,119.**

1921.

March 11. Filed libel of West, Elliott & Gordon, a corporation, for the sum of \$32.54.
Issued monition, returnable March 22d, 1921.

IRA S. LILLICK, Esq., Proctor.
PILLSBURY, MADISON & SUTRO,
Proctors for Respondent and Claimant.

This cause is still pending. [255]

In the Southern Division of the District Court of the
United States for the Northern District of
California, First Division.

No. 17,120.

C. F. KLITGAARD,

Libelant,

vs.

The American Motorship "BABINDA," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture.

Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,120.**

1921.

March 11. Filed libel of C. F. Klitgaard, for the
sum of \$628.00

Issued monition, returnable March 22d,
1921.

IRA S. LILLICK, Esq., Proctor.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent and Claim-
ant.

This cause is still pending. [256]

In the Southern Division of the District Court of the
United States for the Northern District of
California, First Division.

No. 17,125.

HAVISIDE COMPANY, a Corporation,
Libelant,

vs.

The American Motorship "BABINDA," Her En-
gines, Boilers, Machinery, Tackle, Apparel
and Furniture.

Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,125.**

1921.

March 12th. Filed libel of Haviside Company, a
corporation, for the sum of \$3,-
443.53,

Issued monition, returnable March 22d, 1921.

IRA S. LILLICK, Esq., Proctor.

PILLSBURY, MADISON & SUTRO, Proctors for Respondent and Claimant.

This cause is still pending. [257]

In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 17,126.

HAVISIDE COMPANY, a Corporation,
Libelant,

vs.

The American Motorship "CETHANA," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture.

Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,126.**

1921.

March 12th. Filed libel of Haviside Company, a corporation, for the sum of \$1255.12. Issued monition, returnable March 22, 1921.

IRA S. LILLICK, Esq., Proctor.

PILLSBURY, MADISON & SUTRO, Proctors for Respondent and Claimant.

This cause is still pending. [258]

In the Southern Division of the District Court of the
United States for the Northern District of
California, First Division.

No. 17,128.

H. P. MARSHALL,

Libelant,

vs.

The American Motorship "CETHANA," Her
Boilers, Tackle, Apparel and Furniture.

Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,128.**

1921.

March 14th. Filed libel of H. P. Marshall, for the
\$70.54.

Issued monition, returnable March
22d, 1921.

J. F. RESLEURE, Esq., Proctor.

PILLSBURY, MADISON & SU-
TRO, Proctors for Respondent and
Claimant.

This cause is still pending. [259]

In the Southern Division of the District Court of the
United States for the Northern District of
California, First Division.

No. 17,129.

R. JEPSEN,

Libelant,

vs.

The American Motorship "BENOWA," Her
Boilers, Tackle, Apparel and Furniture.

Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,129.**

1921.

March 14. Filed libel of R. Jepsen, for the sum of
\$101.70.

Issued monition, returnable March 22d,
1921.

J. F. RESLEURE, Esq., Proctor.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent and Claim-
ant.

This cause is still pending. [260]

In the Southern Division of the District Court of the
United States for the Northern District of
California, First Division.

No. 17,130.

E. W. MASON,

Libelant,

vs.

The American Motorship "BABINDA," Her
Boilers, Tackle, Apparel and Furniture.

Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,130.**

1921.

March 14. Filed libel of E. W. Mason, for the sum
\$91.66.

Issued monition, returnable March 22d,
1921.

J. F. RESLEURE, Esq., Proctor.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent and Claim-
ant.

This cause is still pending. [261]

In the Southern Division of the District Court of the
United States for the Northern District of
California, First Division.

No. 17,134.

OUTER HARBOR DOCK AND WHARF COM-
PANY, a Corporation,

Libelant,

vs.

The Motorship "BABINDA," Her Tackle, etc.,
Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,134.**

1921.

March 17. Filed libel of Outer Harbor Dock &
Wharf Co., a corporation, for the
sum of \$217.05.

Issued monition, returnable March 22d,
1921.

COONEY & KELLEY, Esqs., Proctors.

1921.

May 7. Filed libel in Intervention of Charles
G. Boot, for the sum of \$2,391.00 and
and double wages, etc.

Issued monition, returnable May 17th,
1921.

HENRY B. LISTER, Esq., Proctor.

1921.

May 11. Filed libel in Intervention by F. H.
Thomas and H. Ford for the sum
of \$3,314.00 and double wages, etc.

Issued monition, returnable May 24th,
1921.

HENRY B. LISTER, Esq., Proctor.
[262]

1921.

May 14. Filed libel in intervention of Glen Ford
and Fred J. Jackson for the sum of
\$1,627.00.

Issued monition, returnable May 24th,
1921.

HENRY B. LISTER, Esq., Proctor.

1921.

June 1. Filed libel in intervention of William
Logan, for the sum of \$887.00.

Issued monition, returnable June 14th,
1921.

HENRY B. LISTER, Esq., Proctor.

Filed Libel in intervention of W. E.
Gerber, Jr., for the sum of \$334,-
000.00.

(No process issued.)

PILLSBURY, MADISON & SUTRO,
Proctors.

1921.

June 20. Filed libel in intervention of Monrat
Martinson for the sum of \$855.00.

(Process waived by respondent.)

HENRY B. LISTER, Esq., Proctor.

1921.

June 24. Filed libel in intervention of Peter
Bovenlander, J. A. Carlson and

Robert Hesketh, for the sum of
\$1,650.00.

(Process waived by respondent.)

HENRY B. LISTER, Esq., Proctor.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent and Claim-
ant.

This cause is still pending. [263]

In the Southern Division of the District Court of the
United States for the Northern District of
California, First Division.

No. 17,135.

OUTER HARBOR DOCK AND WHARF COM-
PANY, a Corporation,

Libelant,

vs.

The Motorship "CETHANA," Her Tackle, etc.,
Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,135.**

1921.

March 17. Filed libel of Outer Harbor Dock &
Wharf Co. a corp., for the sum of
\$122.13.

Issued monition, returnable March 22d,
1921.

COONEY & KELLEY, Proctors.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent and Claim-
ant.

This cause is still pending. [264]

In the Southern Division of the District Court of the
United States for the Northern District of
California, First Division.

No. 17,139.

W. C. W. RENNY,

Libelant,

vs.

The American Motorship "BENOWA," Her En-
gines, Boilers, Tackle, Machinery, Apparel
and Furniture.

Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,139.**

1921.

March 19. Filed libel of W. C. W. Renny for the
sum of \$1,929.37.

Issued monition, returnable March 22d,
1921.

IRA S. LILLICK, Esq., Proctor.

1921.

April 21. Filed libel in intervention of The Com-
monwealth of Australia, etc., for the
sum of \$1,625,000.00 (W. E. Gerber,
Jr., was since substituted as Inter-
vening libelant).

Issued monition, returnable May 3d,
1921.

PILLSBURY, MADISON & SUTRO,
Proctor for Substituted Intervening
Libelant.

PILLSBURY, MADISON & SUTRO,
Proctor for Respondent and Claim-
ant.

1921.

June 22. Filed stipulation for dismissal of libel.
[265]

In the Southern Division of the District Court of
the United States for the Northern District of
California, First Division.

No. 17,142.

PACIFIC STEAM NAVIGATION COMPANY,
a Corporation,

Libelant,

vs.

PACIFIC MOTORSHIP COMPANY, a Corpora-
tion,

Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,142.**

1921.

March 23, Filed libel *in personam* of Pacific Steam
Navigation Company, a corp. for the
sum of \$43,000.00.

1921.

March 24, Issued citation, returnable April 5th,
1921.

Issued writ of foreign attachment.

GOODFELLOW, EELLS, MOORE &
ORRICK, Proctors.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent.

This cause is still pending. [266]

In the Southern Division of the District Court of
the United States for the Northern District of
California, First Division.

No. 17,145.

PACIFIC CONSTRUCTION & ENGINEERING
CO., a Corporation,

Libelant,

vs.

The American Motorship "BENOWA," Her En-
gines, Boilers, Tackle and Appurtenances,
Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,145.**

1921.

March 24, Filed libel of Pacific Construction &
Engineering Company, a corp. for the
sum of \$1144.75.

Issued monition, returnable March 29th,
1921.

IRA S. LILLICK, Esq., Proctor.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent and Claim-
ant.

This cause is still pending [267]

In the Southern Division of the District Court of
the United States for the Northern District of
California, First Division.

No. 17,146.

COMMERCIAL IMPORTING COMPANY, a Cor-
poration,

Libelant,

vs.

The American Motorship "CETHANA," Her En-
gines, Tackle, Apparel, etc.

Respondent.

**Statement of Clerk U. S. District Court as Per
Stipulation and Order—Case No. 17,146.**

1921.

March 24, Filed libel of Commercial Importing
Company, a corporation, for the sum
of \$166.95.

Issued monition, returnable March 29th,
1921.

ANDROS & HENGSTLER and F. W.
DORR, Esq., Proctors.

PILLSBURY, MADISON & SUTRO,
Proctors for Respondent and Claim-
ant.

This cause is still pending. [268]

(Docket Entries—Equity Case No. 595.)

DOCKET.

United States District Court.

Docket 595.

TITLE OF CASE.	ATTORNEYS.
W. E. GERBER, Jr., Substituted for The Commonwealth of Australia, etc., et al.,) Pillsbury, Madison & Sutro, for) Gerber; E. J. McCutchen, J.) M. Mannon, Jr., McCutchen,) Willard, Mannon & Greene.
vs.) To declare and foreclose an) equitable lien and for a re-) ceiver.
PACIFIC MOTORSHIP COM- PANY et al.) N. A. Frank & I. H. Frank,) Attys. for Recr.

Date.

Month. Day. Year.

Mar. 8, 1921. Filed complaint. Filed praecipe.
Issuing *subpoena ad res.* and 6
Copies.

Mar. 11, 1921. Ord. application for receiver con. to
14.

Mar. 14, 1921. Ord. application for receiver heard,
argued and submitted and ord.
suit dismissed as to W. L. Comyn.

Mar. 16, 1921. Filed plffs. memorandum. Filed
reporter's transcript of proceed-
ings.

Mar. 18, 1921. Ord. application for appointment of
a receiver granted, etc., and objec-
tions to jurisdiction of Court
overruled.

- Mar. 26, 1921. Filed and entered order appointing receiver (O. B. 7, p. 419).
- Mar. 28, 1921. Taking oath, etc. Filed oath of receiver. Filed bond of receiver. Made 4 certified copies of order appointing receiver.
- Mar. 29, 1921. Made cert'd copy of order appointing recr.
- April 1, 1921. Filed *subpoena ad res.* with marshal's return showing service on Anglo-California Trust Co.; The Anglo & London Paris National Bank; W. L. Comyn & Co.; Pacific Freighter Company; and Pacific Motorship Co. on March 8, 1921.
- April 9, 1921. Filed petition for leave to file libel. Filed. [269]
- April 9, 1921. Notice of motion. Ord. petition of A. T. Nielsen et al., head and submitted.
- April 12, 1921. Filed report of receiver.
- April 23, 1921. Filed petition of receiver for further powers.
- April 23, 1921. Filed petition of receiver respecting claims.
- April 23, 1921. Filed mem. on petition to libel "Babinda."
- April 25, 1921. Ord. pet'ns con. to 30.
- April 30, 1921. Ord. pet'ns con. to May 2.
- May 2, 1921. Ord. substitution of party plff., etc.

- May 3, 1921. Filed and entered stipulation and order for substitution of W. E. Gerber, Jr., for plffs. (O. B. 7, p. 449).
- May 5, 1921. Filed dismissal. Ord. suit dismissed. Dockets. Filed and entered order for release of vessels. (O. B. 7, p. 453).
- May 12, 1921. Filed and entered stipulation and order as to disposition of money, etc. (O. B. 7, p. 460). Entered and filed order of distribution of money deposited under order of May 5. Dist. Book 2, p. 95). Clerk's percentage on \$15,000.00 \$150.00.
- May 19, 1921. Filed notice of motion for order directing marshal to exclude certain persons from motorship "Benowa."
- May 20, 1921. Filed affidavit of W. E. Gerber, Jr.
- May 21, 1921. Filed affidavit of John E. Dierks. Filed affidavit of E. C. Genereaux. Filed notice of intention to use affidavits.
- May 23, 1921. Ord. petition of A. T. Nielsen et al., for leave to libel the motorship "Babinda" denied. Made and mailed copy to Ira S. Lillick & to McCutchen, Willard, Mannon & Greene. Ord. motion for order

directing marshal to exclude certain persons from ship "Benowa," submitted.

June 2, 1921. Ord. certain securities turned over to deft., etc. Filed and entered order for release of securities (O. B. 7, p. 482). [270]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 595.

THE COMMONWEALTH OF AUSTRALIA, and
THE COMMONWEALTH OF AUSTRALIA by WILLIAM MORRIS HUGHES, Its Attorney General, and WILLIAM MORRIS HUGHES, Attorney General of said THE COMMONWEALTH OF AUSTRALIA, for said THE COMMONWEALTH OF AUSTRALIA,

Plaintiffs,

vs.

PACIFIC MOTORSHIP COMPANY, a Corporation, PACIFIC FREIGHTERS COMPANY, a Corporation, ANGLO CALIFORNIA TRUST COMPANY, a Corporation, THE ANGLO & LONDON PARIS NATIONAL BANK, a National Banking Association, W. L. COMYN & CO., a Corporation, W. L. COMYN, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH

DOE, SIXTH DOE, SEVENTH DOE, EIGHTH DOE, NINTH DOE, TENTH DOE, FIRST DOE COMPANY, a Corporation, SECOND DOE COMPANY, a Corporation, THIRD DOE COMPANY, a Corporation, FOURTH DOE COMPANY, a Corporation, FIFTH DOE COMPANY, a Corporation, SIXTH DOE COMPANY, a Corporation, SEVENTH DOE COMPANY, a Corporation, EIGHTH DOE COMPANY, a Corporation, NINTH DOE COMPANY, a Corporation, and TENTH DOE COMPANY, a Corporation,

Defendants.

**Complaint to Declare and Foreclose an Equitable
Lien and for a Receiver.**

Now comes plaintiff above named and complains against [271] defendants herein, and each of them, and for cause of action alleges:

I.

That plaintiff, The Commonwealth of Australia, is, and at all times herein mentioned was, a self-governing colony of the United Kingdom of Great Britain and Ireland.

That the above-named William Morris Hughes is the duly qualified and acting Attorney General of said The Commonwealth of Australia.

That under and by virtue of the laws of said United Kingdom of Great Britain and Ireland, and of said The Commonwealth of Australia, said The Commonwealth of Australia is entitled to sue for the

enforcement of any rights of action existing in its favor in any courts, in the name of said Commonwealth, or such suits or actions may be brought and prosecuted in the name of said Commonwealth by its Attorney General, or by and in the name of its Attorney General, for and in behalf of said Commonwealth.

That wherever the term "plaintiff" is used hereinafter in this complaint, said term is so used to refer to the aforesaid The Commonwealth of Australia.
[272]

II.

That defendant herein, Pacific Motorship Company, is and at all of the times with respect to which reference is herein made to said corporation was, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and duly qualified to do and carry on, and doing and carrying on, business in the State of California, with its principal place of business in the Southern Division of the United States District Court for the Northern District of California, to wit, in the City and County of San Francisco, State of California; that said last-named defendant is, and at all of said times was, a citizen of the State of Delaware, but by reason of its maintaining its principal place of business as aforesaid is a resident and inhabitant of the said Southern Division of said United States District Court for the Northern District of California.

That the defendants hereinabove named, Pacific Freighters Company, is, and at all of the times with respect to which reference is herein made to said cor-

poration was, a corporation duly organized and existing under and by virtue of the laws of the State of California with its principal place of business within the Southern Division of the United States District Court for the Northern District of California, to wit, in the City and County of San Francisco, State of California, and is a citizen of the State of California and a resident and inhabitant of said Southern Division of the United States District Court for the Northern District of California.

That defendant herein, Anglo-California Trust Company, is, and at all of the times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of [2721½] the State of California, with its principal place of business in the Southern Division of the United States District Court for the Northern District of California, to wit, in the City and County of San Francisco, State of California, and is a citizen of the State of California and a resident and inhabitant of said Southern Division of the United States District Court for the Northern District of California.

That defendant herein, The Anglo & London, Paris National Bank, is, and at all times herein mentioned was, a national Banking association duly organized and existing under and by virtue of the laws of the United States, with its principal place of business in the Southern Division of the United States District Court for the Northern District of California, to wit, in the City and County of San Francisco, State of California, and is a citizen of the State of California and a resident and inhabitant of

said Southern Division of the United States District Court for the Northern District of California.

That defendant herein, W. L. Comyn & Co., is, and at all of the times with reference to which said corporation is mentioned herein was, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the Southern Division of the United States District Court for the Northern District of California, to wit, in the City and County of San Francisco, State of California, and is a citizen of the State of California and a resident and inhabitant of said Southern Division of the United States District Court for the Northern District of California.

That defendant herein, W. L. Comyn, is, and at all of the times herein mentioned was, a subject of the United Kingdom of Great Britain and Ireland and a resident and inhabitant of the State of California, and, to wit, a resident and inhabitant of [273] the Southern Division of the United States District Court for the Northern District of California.

That said defendants, The Anglo & London Paris National Bank, W. L. Comyn & Company and W. L. Comyn claim, and each of them claims, some interest in or lien upon the property listed and referred to in the list attached as Exhibit "A" to the agreement of October 21, 1920, hereinafter referred to; that said claims are, and each of them is, wholly without right, and that any interest or right of said defendants, or any of them, in or to said property, or any part

thereof, is subject and subordinate to plaintiff's rights herein asserted.

III.

That the defendants herein, First Doe Company, a corporation, Second Doe Company, a corporation, Third Doe Company, a corporation, Fourth Doe Company, a corporation, Fifth Doe Company, a corporation, Sixth Doe Company, a corporation, Seventh Doe Company, a corporation, Eighth Doe Company, a corporation, Ninth Doe Company, a corporation, and Tenth Doe Company, a corporation, above named, are corporations, and each of said corporations is a corporation, duly organized and existing as such; that defendants hereinabove named, First Doe to Tenth Doe, inclusive, and First Doe Company to Tenth Doe Company, inclusive, claim some interest in or lien upon the personal property hereinafter described, or some of it, adversely to plaintiff, but that the claims of said defendants [274] are, and each of them is, wholly without right, and that whatever right or rights said defendants or any of them may have are wholly subordinate to the rights of plaintiff herein asserted. That the true names of said defendants and of each of them are at this time unknown to plaintiffs, and said defendants are for that reason sued herein under the aforesaid names, which are fictitious names, and each of said defendants is so sued, and plaintiff prays that when the true names of said defendants, and of each of said defendants, become known, said plaintiffs may be allowed to substitute the true names for said fictitious names, or when the true name of each or any of said

defendants becomes known, said plaintiffs may be allowed to substitute said true named for the afore-said fictitious name of such defendant.

IV.

That on and prior to September 2, 1919, plaintiff was the owner of four motorships named, respectively, "Benowa," "Balcatta," "Boobyalla" and "Babinda," said last-mentioned [275] four motorships being hereinafter referred to as the "B" boats, and also four motorships named, respectively, "Culburra," "Cethana," "Challamba" and "Coolcha," said last-named four motorships being hereinafter referred to as the "C" boats; that on or about the 2d day of September, 1919, plaintiff sold and transferred to one J. E. Chilberg said motorship "Benowa" at an agreed price of four hundred and thirty thousand (430,000) dollars; that on said last mentioned date said J. E. Chilberg paid to plaintiff on account of the said purchase price of said motorship "Benowa" the sum of eighty-six thousand (86,000) dollars in cash, and made, executed and delivered to plaintiff his certain four promissory notes for the balance of said purchase price, to wit, the sum of three hundred and forty-four thousand (344,000) dollars, each of said notes bearing date January 5, 1920, and each of said notes being for the principal sum of eighty-six thousand (86,000) dollars and bearing interest at the rate of six (6) per cent per annum, payable annually, said four notes being payable as to principal one, two, three and four years from date, respectively, and also made, executed and delivered to plaintiff a mortgage upon

said motorship "Benowa" securing the payment of said notes; that on or about the 2d day of September, 1919, plaintiff sold and transferred to said J. E. Chilberg said motorship "Balcatta," at an agreed price of four hundred and thirty thousand (430,000) dollars; that on said last mentioned date said J. E. Chilberg paid to plaintiff on account of the said purchase price of said motorship "Balcatta" the sum of eighty-six thousand (86,000) dollars in cash, and made, executed and delivered to plaintiff his certain four promissory notes for the balance of said purchase price, to wit, the sum of three hundred forty-four [276] thousand (344,000) dollars, each of said notes bearing date October 30, 1919, and each of said notes being for the principal sum of eighty-six thousand (86,000) dollars and bearing interest at the rate of six (6) per cent per annum, payable annually, said four notes being payable as to principal one, two, three and four years from date, respectively, and also made, executed and delivered to plaintiff a mortgage upon said motorship "Balcatta" securing the payment of said notes; that on or about the 2d day of September, 1919, plaintiff sold and transferred to said J. E. Chilberg said motorship "Boobyalla" at an agreed price of four hundred and thirty thousand (430,000) dollars; that on said last mentioned date said J. E. Chilberg paid to plaintiff on account of the said purchase price of said motorship "Boobyalla" the sum of eighty-six thousand (86,000) dollars in cash, and made, executed and delivered to plaintiff his certain four promissory notes for the balance of said purchase price, to wit,

the sum of three hundred forty-four thousand (344,000) dollars, each of said notes bearing date February 24, 1920, and each of said notes being for the principal sum of eighty-six thousand (86,000) dollars and bearing interest at the rate of six (6) per cent per annum, payable annually, said four notes being payable as to principal one, two, three and four years from date, respectively, and also made, executed and delivered to plaintiff a mortgage upon said motorship "Boobyalla" securing the payment of said notes; that on or about the 2d day of September, 1919, plaintiff sold and transferred to one J. E. Chilberg said motorship "Babinda" at an agreed price of four hundred and thirty thousand (430,000) dollars; that on said last mentioned date said J. E. Chilberg paid to plaintiff on account of the said purchase price of said [276½] motorship "Babinda" the sum of eighty-six thousand (86,000) dollars in cash, and made, executed and delivered to plaintiff his certain four promissory notes for the balance of said purchase price, to wit, the sum of three hundred forty-four thousand (344,000) dollars, each of said notes bearing date September 24, 1919, and each of said notes being for the principal sum of eighty-six thousand (86,000) dollars and bearing interest at the rate of six (6) per cent per annum, payable annually, said four notes being payable as to principal, one, two, three, and four years from date, respectively, and also made, executed and delivered to plaintiff a mortgage upon said motorship "Babinda" securing the payment of said notes. That no portion of the principal or interest of said sixteen (16) promissory

notes above referred to, or any of them, was paid prior to the 21st day of October, 1920, nor has any portion thereof ever been paid, excepting in so far as the same may have been paid by reason of the execution of the said agreement, of which Exhibit No. 1 attached hereto is a copy.

That on or about the said 2d day of September, 1919, plaintiff sold and transferred to the said J. E. Chilberg the said motorship "Culburra" at an agreed price of three hundred thousand (300,000) dollars; that on said last mentioned date the said J. E. Chilberg paid to plaintiff on account of the said purchase price of said motorship "Culburra" the sum of sixty thousand (60,000) dollars in cash, and made, executed and delivered to plaintiff his promissory notes for the balance of said purchase price, to wit, the sum of two hundred and forty thousand (240,000) dollars, and also made, executed and delivered to plaintiff a mortgage upon said motorship "Culburra" to secure the payment of said notes; that on or about the said 2d day of September, 1919, plaintiff sold and transferred to the said J. E. Chilberg the said motorship [277] "Cethana" at an agreed price of three hundred thousand (300,000) dollars; that on said last-mentioned date the said J. E. Chilberg paid to plaintiff on account of the purchase price of said motorship "Cethana" the sum of sixty thousand (60,000) dollars in cash, and made, executed and delivered to plaintiff his promissory notes for the balance of said purchase price, to wit, the sum of two hundred and forty thousand (240,000) dollars, and also made, executed

and delivered to plaintiff a mortgage upon said motorship "Cethana" to secure the payment of said notes; that on or about the said 2d day of September, 1919, plaintiff sold and transferred to the said J. E. Chilberg the said motorship "Challamba" at an agreed price of three hundred thousand (300,000) dollars; that on said last-mentioned date the said J. E. Chilberg paid to plaintiff on account of the purchase price of said motorship "Challamba" the sum of sixty thousand (60,000) dollars in cash, and made, executed and delivered to plaintiff his promissory notes for the balance of said purchase price, to wit, the sum of two hundred and forty thousand (240,000) dollars, and also made, executed and delivered to plaintiff a mortgage upon said motorship "Challamba" to secure the payment of said notes; that on or about the said 2d day of September, 1919, plaintiff sold and transferred to the said J. E. Chilberg the said motorship "Coolcha" at an agreed price of three hundred thousand (300,000) dollars; that on said last-mentioned date the said J. E. Chilberg paid to plaintiff on account of the purchase price of said motorship "Coolcha" the sum of sixty thousand (60,000) dollars in cash, and made, executed and delivered to plaintiff his promissory notes for the balance of said purchase price, to wit, the sum of two hundred and forty thousand (240,000) dollars, and also made, executed and delivered [278] to plaintiff a mortgage upon said motorship "Coolcha" to secure the payment of said notes.

That thereafter and prior to the 21st day of Octo-

ber, 1920, and prior to the making of the contract hereinafter referred to and designated as Exhibit No. 1, defendant herein, Pacific Motorship Company succeeded to all of the right, title and interest of the said Chilberg in and to said "B" boats and each of them, subject, however, to the lien of said mortgages given upon said "B" boats, respectively, by said Chilberg, as hereinabove set forth, and said defendant Pacific Motorship Company did at said time assume the payment of the said notes secured by said mortgages, and each of said notes, according to their tenor, and agreed in writing to pay the same.

That on said 21st day of October, 1920, and prior to the making of said contract hereinafter referred to and designated as Exhibit No. 1, said Chilberg made and entered into an agreement with plaintiff wherein and whereby said Chilberg agreed, for a good and valuable consideration, to reconvey said "C" boats to plaintiff upon demand.

V.

That on the 21st day of October, 1920 at the City and County of San Francisco, State of California, plaintiff, as party of the first part, and the defendant herein, Pacific Motorship Company, and the defendant herein, Pacific Freighters Company, as parties of the second part, made and entered into an agreement in writing, a copy of which is annexed hereto and hereby referred to and marked Exhibit No. 1 and made a part hereof; that in and by said last mentioned agreement plaintiff agreed to release its said mortgage liens upon the said

“B” boats and each of them, and to sell to the said [279] defendants, Pacific Motorship Company and Pacific Freighters Company, said “C” boats and each of them, all for the sum of one million six hundred and twenty-five thousand (1,625,000) dollars, said last named sum to be paid plaintiff as in said agreement and as is hereinafter set forth.

That in and by said last mentioned agreement said defendant Pacific Motorship Company and said defendant Pacific Freighters Company agreed that said sum of one million six hundred and twenty-five thousand (1,625,000) dollars should be paid to plaintiff as therein provided, that is to say, said defendants and each of them agreed to incorporate or cause to be incorporated a corporation under the laws of the State of California, and to transfer or cause to be transferred to said corporation the said “B” boats and the said “C” boats and certain other vessels owned by said defendants or by one or the other of said defendants, and certain interests in certain other vessels owned by said defendants or by one or the other of said defendants, and certain shares of the capital stock of certain corporations owned by said defendants or owned by one or the other of said defendants; that the properties so agreed to be transferred and conveyed to said new corporation were and are listed and set forth upon a list marked as Exhibit “A” to said agreement of October 21, 1920, which is attached hereto and marked Exhibit No. 1, and in and by said agreement said defendants and each of them

further agreed that upon that incorporation of said new corporation, as aforesaid, and upon the transfer and conveyance thereto of the title to the properties listed in said Exhibit "A" to said agreement as aforesaid, said new corporation should thereupon in the manner provided by law create a bond issue of two [280] thousand (2,000) gold bonds having a par value of one thousand (1,000) dollars each, dated January 1, 1921, said bonds to be payable as to principal as specifically provided in said agreement and said bonds to bear interest at the rate of seven (7) per cent per annum, payable semi-annually, and said entire issue of bonds to be secured by a mortgage or deed of trust to be made, executed and delivered by said new corporation to the defendant herein, Anglo-California Trust Company, as trustee, upon the terms and in the manner particularly and specifically set forth in said agreement; and in and by said agreement said defendants and each of them further agreed that one thousand six hundred and twenty-five (1,625) of said bonds should thereupon be delivered to plaintiff herein in payment of said purchase price of said "C" boats above described and of the mortgage lien on said "B" boats above described, to wit, in payment of said sum of one million six hundred and twenty-five thousand (1,625,000) dollars above referred to, and said bonds were to be so delivered to plaintiff in exchange for releases of said mortgages on said "B" boats for bills of sale covering said "C" boats, as in said agreement specially provided.

That in and by said agreement, to wit, said Exhibit No. 1, plaintiff agreed that it would on or prior to January 15, 1921, cause title to said "C" boats and each of them to be transferred to said defendant, Anglo-California Trust Company, upon the trusts in said agreement specified, subject only to certain encumbrances or liabilities in said agreement designated; that pursuant to said agreement said plaintiff did, prior to the 15th day of January, 1921, cause title to said "C" boats, and each of them, to be transferred to said [281] defendant, Anglo-California Trust Company, as aforesaid, and that said defendant, Anglo-California Trust Company, now holds title to said "C" boats and each of them, as aforesaid.

VII.

That in and by said agreement, to wit, said Exhibit No. 1, said defendant Pacific Motorship Company and said defendant Pacific Freighters Company, and each of them, agreed that as security for the faithful performance of said agreement concurrently with the execution thereof the said defendants, and each of them, would deliver to the said Anglo-California Trust Company bills of sale, in the usual government form, of the respective vessels owned by them and noted on the Exhibit "A" thereto attached, and of the interests in said other vessels owned by them and noted on said Exhibit "A"; together with the said certificates for all of the shares of capital stock listed on said Exhibit "A," and that the same should be endorsed in blank; that pursuant to said last mentioned pro-

visions of said agreement, said defendants and each of them did concurrently with the execution of said agreement, and as a part of the same transaction deliver to said defendant, Anglo-California Trust Company, bills of sale in the usual Government form, covering the respective vessels owned by them, and also bills of sale in the usual government form conveying their interest listed in said exhibit in vessels not entirely owned by them, together with certificates of stock for all of the shares of capital stock listed on said exhibit, said certifications of stock being endorsed by said defendants in blank; that said vessels and interests in vessels, covered [282] by said last named bills of sale and said stock, ever since have been and are now so held by said defendant Anglo-California Trust Company as security for the faithful performance of said agreement, as aforesaid.

VIII.

That plaintiff is, and ever since prior to the 15th day of January, 1921, has been, ready, able and willing to make, execute and deliver to said new corporation releases of the existing mortgages upon said "B" boats, as above set forth, in the manner and form provided in said agreement, and to make, execute and deliver to said new corporation said bills of sale covering said "C" boats and each of them, in the manner and form provided in said agreement, and to do all other things and acts on its part required to be done pursuant to said agreement, in order to entitle it to receive delivery of said one thousand six hundred and twenty-five

(1,625) bonds hereinabove described; that continuously since prior to said 15th day of January, 1921, said plaintiff has offered and tendered to said defendants, Pacific Motorship Company, and Pacific Freighters Company, to do and perform each and every of the acts and things on its part required to be done or performed pursuant to said agreement, in order to entitle it to delivery of said one thousand six hundred and twenty-five (1,625) bonds, as provided in said agreement, but that said defendants and each of them have continuously and wrongfully declined and refused, and still decline and refuse, to accept said tenders and offers, and have continuously and wrongfully refused, and still wrongfully decline and refuse, to deliver or cause to be delivered to plaintiff said one thousand six hundred and twenty-five (1,625) bonds, or any [283] of them, or to proceed with the incorporation of said new corporation, as provided in said agreement, or to transfer to said new corporation any of the assets referred to in said list annexed to said agreement as Exhibit "A." That said defendants and each of them have stated and declared to plaintiff that they and each of them will decline further to proceed with the performance of the covenants on their part to be performed by said agreement, and particularly will refuse to proceed with the incorporation of said new corporation or the transfer of said assets to said new corporation or the creation of said bond issue or the delivery of said one thousand six hundred and

twenty-five (1,625) bonds, or any of them, to plaintiff, as aforesaid.

IX.

That by reason of the foregoing facts, plaintiff is entitled to a lien in equity upon said "B" boats and each of them, and upon said "C" boats and each of them, and upon each and every of the assets listed and referred to in said Exhibit "A" to said agreement, as aforesaid, as security for the payment of said sum of one million six hundred and twenty-five thousand (1,625,000) dollars, together with interest thereon as in said agreement provided, said sum of one million six hundred and twenty-five thousand (1,625,000) dollars being the sum agreed to be paid by said defendant Pacific Motorship Company and said defendant Pacific Freighters Company, and each of them, as aforesaid, for the release of said mortgages owned and held by plaintiff on said "B" boats, respectively, and for the purchase price of said "C" boats as hereinabove set forth.

X.

That pursuant to the terms of said agreement said "B" [284] boats and said "C" boats and the other vessels referred to and listed in said Exhibit "A" to said agreement of October 21, 1920, have been since the 21st day of October, 1920, operated by the defendants herein, Pacific Motorship Company and Pacific Freighters Company; that ever since said 21st day of October, 1920, said vessels have been operated by said last named defendants at a heavy loss and heavy indebtedness,

which plaintiff is informed and believes, and therefore alleges, exceeds the sum of five hundred thousand (500,000) dollars, which has been incurred in their operation by said defendants over and above the proceeds of all freight and other moneys derived from their operation; that numerous creditors of said last-named defendants for debts incurred in the operation, care and maintenance of said vessels and otherwise, threaten to and will proceed against said vessels by libel or attachment for the enforcement of their said claims; that said creditors by said threatened action will endeavor to obtain liens upon said vessels or some of them, which will be claimed to be superior to the said lien of this plaintiff for the payment of said sum of one million six hundred and twenty-five thousand (1,625,000) dollars. That unless a receiver be appointed to take charge of said assets listed and referred to in said Exhibit "A" to said agreement of October 21, 1920, the security of this plaintiff for the payment of said sum of one million six hundred and twenty-five thousand (1,625,000) dollars will be in part or in whole displaced or destroyed or impaired, and thereby and otherwise inadequate and insufficient to satisfy said amount so secured. That said defendants Pacific Motorship Company and Pacific Freighters Company have informed plaintiff, and that plaintiff is further advised and believes, and therefore [285] alleges, that said defendants are and each of them is without funds further to continue in the operation, maintenance or care of said vessels or any of

them. That the insurance on certain of said vessels has expired and on certain of said vessels is about to expire for nonpayment of the premiums thereof; that there are now due, owing and unpaid to various insurance companies premiums on account of marine insurance carried upon said vessels as required and provided in and by said agreement of October 21, 1920, said premiums so unpaid being in an amount in excess of two hundred thousand (200,000) dollars; and that said companies threaten to and will cancel said policies forthwith for nonpayment of said premiums; that the premiums for the insurance covering the marine risks on said motorship "Balcatta" are unpaid and that the insurance company covering the same threatens to cancel said insurance upon the 7th day of March, 1921, by reason of such nonpayment if the same be not paid on or before the said date; that said last-named defendants have stated to plaintiff, and that plaintiff is informed and believes, and therefore alleges, that said defendants are and each of them is without funds to pay said premiums or any thereof; that by reason thereof the security to which plaintiff is entitled as aforesaid for the payment of said sum of one million six hundred and twenty-five thousand (1,625,000) dollars is threatened with destruction, either in whole or in part, or with substantial impairment; that the said motorship "Balcatta" is now lying in the harbor of Valparaiso, Chile, in a capsized condition, and that last named defendants are unable by reason of want of funds to take the necessary

steps for her preservation and that unless such steps are taken expeditiously said "Balcatta" will in all likelihood [286] prove a total loss and be destroyed, with the result that plaintiff will be deprived of any security therefrom for the payment of said sum of one million six hundred and twenty-five thousand (\$1,625,000) dollars, as above set forth; that the said motorship "Benowa" is at present in the harbor of San Francisco and is in need of repairs by reason of an accident which took place on a trip which said motorship has just completed from the Atlantic Coast and while said motorship was passing through the Panama Canal; that by reason of the inability of said defendants or any of them to pay for such repairs, said repairs may not be made, unless a receiver is appointed herein as herein prayed for, and said motorship "Benowa" will suffer substantially injury thereby, to the further impairment of plaintiff's said lien; that others of said motorships and said vessels listed and described in said list marked Exhibit "A" to said agreement are in various difficulties and needs requiring the immediate expenditure of money, and that unless such expenditure be made, plaintiff's rights herein will be prejudiced by the impairment or total destruction of its security for the payment of said one million six hundred and twenty-five thousand (\$1,625,000) dollars.

XI.

That on the 7th day of March, 1921, two actions were commenced in the Southern Division of the United States District Court for the Northern

District of California, First Division, In Admiralty, by the Pacific Steam Navigation Company, a corporation; that in and by said actions the libellant therein seeks to recover an indebtedness against two of the vessels referred to and listed on said list attached to said agreement of October 21, 1920, as Exhibit "A" thereto, and seeks to obtain a lien or [287] liens for the payment of said indebtedness upon said vessels; that the amount sued for in each of said actions is the sum of sixty-two thousand five hundred (\$62,500.00) dollars; that numerous other firms, persons and corporations are threatening to commence other actions of a similar nature and to seek thereby to obtain similar liens upon said vessels or certain of them; that the object of each and all actions is and will be to supplant and displace the rightful lien of plaintiff herein for the payment of said sum of one million six hundred and twenty-five thousand (\$1,625,000) dollars, hereinabove in this complaint described.

XII.

That by reason of the facts in this complaint alleged, plaintiff will suffer irreparable injury if a receiver be not forthwith appointed by this Court as is herein prayed.

XIII.

That in and by this action, plaintiff seeks as a creditor of the defendant herein, Pacific Motorship Company, and of defendant herein, Pacific Freighters Company, to subject the property described and listed on said list marked Exhibit "A" as aforesaid to its claim as is herein alleged.

XIV.

That this action is an action by plaintiff for the foreclosure of a mortgage and for the sale of the mortgaged property, to wit, the property described and listed in said list marked Exhibit "A" as aforesaid and that the mortgaged property is in danger of being lost, removed and materially injured and that it appears that the mortgaged property is in danger of being lost, removed and materially injured; that the condition of the mortgage has not been performed and that the said mortgaged property is probably insufficient to discharge the mortgage [288] debt, to wit, the said sum of one million six hundred and twenty-five thousand (\$1,-625,000.00) dollars.

XV.

That said defendant herein, Pacific Motorship Company, is insolvent and that the defendant herein, Pacific Freighters Company, is insolvent.

XVI.

That the case set out in this complaint is a case in which receivers have heretofore been appointed by the usages of the courts of equity.

XVII.

That plaintiffs are without an adequate remedy at law in the premises.

XVIII.

That the matter herein in controversy exceeds, exclusive of interest and costs, the sum of three thousand (\$3,000.00) dollars.

WHEREFORE, plaintiffs pray for judgment herein as follows:

(1) That it be adjudged and decreed that plaintiff is [289] entitled to a lien upon said four "B" boats and said four "C" boats and each of them, and upon each and every of the properties and assets specified and listed in said list attached as Exhibit "A" to said agreement of October 21, 1920, for the payment by said defendant Pacific Motorship Company and said defendant Pacific Freighters Company of said sum of one million six hundred and twenty-five thousand (1,625,000) dollars and interest thereon as provided in said agreement; that said lien be declared a first lien in and upon said assets and each of them.

(2) That it be adjudged and decreed that any rights whatever which may be found to exist in or to any of said assets in favor of any of the defendants herein may be decreed to be subject to and subordinate to the said lien of said plaintiff as aforesaid.

(3) That it be adjudged and decreed that the said defendant Pacific Motorship Company and said defendant Pacific Freighters Company are, and each of them is, indebted to plaintiff in the sum of one million six hundred and twenty-five thousand (1,625,000) dollars, as provided in said agreement of October 21, 1920, together with interest thereon as therein provided, and that the said assets listed and referred to in said Exhibit "A" to said agreement, and each of said assets, be decreed to be sold in the manner provided by law in satisfaction of the amount so found to be due.

(4) That a proper and suitable person may be

forthwith appointed to take possession of, have charge of, operate, manage, control and preserve all of said assets referred to and described in said Exhibit "A" to said agreement of [290] October 21, 1920, a copy of which said agreement is hereunto attached and marked Exhibit No. 1, and to receive and collect any moneys now due or to become due as freight earnings from the operation of said vessels, including all assets, choses in action, accounts and books of account, correspondence, papers and memoranda having to do with said assets or any of them, whether in the possession of defendants, or any of them, or of any other person acting in defendants' behalf, or in behalf of any of the defendants herein, with authority to receive and hold said property as such receiver until the further order of this court, and with authority to commence, intervene in, and defend any suits or actions which are now or may hereafter be brought, or be necessary or requisite to be brought, which involve in any way the title or the possession of the said personal property described in said Exhibit "A" to said agreement of October 21, 1920, and with all other powers and authority customary and usual according to the rules and practice of this court and which the court may deem necessary or proper in the premises.

(5) That plaintiffs be awarded their costs of suit herein incurred.

(6) For such other and further relief as may seem meet and equitable in the premises.

E. J. McCUTCHEN,

J. M. MANNON, Jr.,

McCUTCHEN, WILLARD, MANNON &
GREENE,

Attorneys for Plaintiff. [291]

State and Northern District of California,
Southern Division,—ss.

J. M. Mannon, Jr., being first duly sworn, deposes and says:

That he is an attorney at law, duly authorized and licensed to practice in all of the courts of the State of California; that he is a member of the firm of McCutchen, Willard, Mannon & Greene, attorneys for the plaintiff in the above-entitled action; that affiant and the said firm have their offices in the City and County of San Francisco, in said State.

That the plaintiff is a self-governing colony of the United Kingdom of Great Britain and Ireland; that all of its officers are nonresidents of the State of California and are all outside the said State of California, and that no one of the officers of the plaintiff is within the State of California, the place where affiant and the said firm of McCutchen, Willard, Mannon & Greene have his and their offices; that affiant makes this affidavit on behalf of the plaintiff by reason of the facts hereinbefore set forth; that affiant has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters

therein stated on information and belief, and as to those matters he believes it to be true.

J. M. MANNON, Jr.

Subscribed and sworn to before me this 7th day of March, A. D. 1921.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California. [292]

Exhibit No. 1.

THIS AGREEMENT, made this 21st day of October, one thousand nine hundred and twenty, between H. B. G. LARKIN, acting for and on behalf of THE COMMONWEALTH OF AUSTRALIA, the first party, and PACIFIC MOTORSHIP COMPANY, a corporation under the laws of Delaware, and PACIFIC FREIGHTERS COMPANY, a corporation under the laws of California, the second parties,

WITNESSETH:

(1) First party hereby agrees to release its mortgage liens on the motorships "Boobyalla," "Balcatta," "Babinda" and "Benowa," known as "B" boats, and to sell to the second parties the motorships "Cethana," "Coolcha," "Culburra," and "Challambra," known as the "C" boats, for the sum of one million six hundred and twenty-five thousand dollars (\$1,625,000), which sum the second parties agree to pay, or cause to be paid, to the first party in the manner hereinafter specified, which payment will be in addition to the other sums heretofore paid and invested by the second parties in

said boats. It is understood that the title to the above-named "C" boats is now vested in J. E. Chilberg and that these vessels are subject to certain encumbrances. The first party will cause title to said "C" boats to be transferred to the Trustee hereinafter named, upon the trusts hereinafter specified, subject only to any encumbrance or liabilities attaching thereto for advances to said ships, or to J. E. Chilberg, or for repairs, supplies, maintenance, equipment, or in any manner arising out of the operation of said ships, since their delivery to J. E. Chilberg, by the first party, and/or the builders, and excepting builders' liens and liens for supplies furnished at and prior to the time the boats were in the first place delivered to said Chilberg by [293] the Commonwealth of Australia and/or the builders.

(2) The second parties will cause a corporation to be formed under the laws of California, with an authorized capital of not less than two million dollars (\$2,000,000), and will transfer and convey, or cause to be transferred and conveyed, to said corporation the assets of the second parties as the same are listed in the exhibit hereto attached designated "List of Assets of Pacific Motorship Company and Pacific Freighters Company," and marked Exhibit "A" and made a part hereof. The written consent of the holders of two-thirds of the issued and outstanding capital stock of each of the second parties shall be secured to such transfer and delivered to the first party. Such new corporation shall have five (5) directors, and the first party shall have the right to name one (1) director at any time

while it is the owner of any of the bonds hereinafter provided for.

(3) As security for the faithful performance of this agreement, concurrently with the execution hereof, the second parties shall deliver to the Anglo-California Trust Company bills of sale in the usual government form of the respective vessels owned by them and noted on the exhibit hereto attached, together with the certificates of stock for all of the stock listed on said exhibit, and the same shall be endorsed in blank.

With delivery of the sixteen hundred and twenty-five (1625) bonds hereinafter described, which the first party is to receive hereunder, the following transactions shall take place concurrently: [294]

(a) The second parties shall receive back the bills of sale above mentioned and the certificates of stock endorsed as aforesaid.

(b) Releases of the existing mortgages on the "B" boats, properly executed by the first party, shall be delivered to the new corporation.

(c) Bills of sale of the "C" boats, in the usual Government form, duly executed either by the first party or by J. E. Chilberg, to the new corporation, shall be delivered to the new corporation.

(d) The certificates for the shares of stock described in the exhibit hereto attached, endorsed in blank, shall be redelivered to the trust company to be held as security under the bond mortgage or deed of trust as hereinafter provided for.

(e) Bills of sale of the vessels listed on the exhibit hereto attached, in the usual Government form

and conveying a clear title, shall be executed and delivered by the second parties to the new corporation.

Upon the completion of these transactions, it is intended that the new corporation shall own all the vessels and securities listed on the exhibit hereto attached, subject only to the bond mortgage or deed of trust.

(4) The second parties will cause said new corporation to create a bond issue of two thousand (2,000) gold bonds having a par value of one thousand (1,000) dollars each, [295] dated January first, one thousand nine hundred and twenty-one. The said bond issue shall be divided into ten (10) series of two hundred (200) bonds each. The said bonds shall bear interest at the rate of seven (7) per cent per annum, payable semi-annually, in San Francisco, and shall be coupon bearer bonds. The first interest coupons shall be payable July first, one thousand nine hundred and twenty-one. Said bonds shall be secured by a first mortgage or deed of trust of the property described in the list of assets hereto attached. Said bonds shall be serial bonds, numbered one to two thousand, both numbers inclusive, and two hundred (200) bonds, or ten (10) per cent of the total issue, being all of one series, shall mature and be redeemed by the new corporation each year, commencing January first, one thousand nine hundred and twenty-one, and the last series of said bonds shall mature and be paid January first, one thousand nine hundred and thirty-one. Sixteen hundred and twenty-five (1625) of said bonds will

be delivered to the first party in payment of the purchase price of the "C" boats above described and of the mortgage liens on the "B" boats. Said sixteen hundred and twenty-five (1625) bonds shall be made up of one hundred and sixty-three (163) bonds of the various series falling due respectively in 1922, 1924, 1926, 1928, and 1930; and one hundred sixty-two (162) of the bonds of the various series falling due respectively in the years 1923, 1925, 1927, 1929, and 1931. An entire series, or ten (10) per cent of the total bond issue shall be retired annually, [296] commencing January first, one thousand nine hundred and twenty-two.

(5) Said second parties will cause said bond issue to be secured by a deed of trust executed by said new corporation as grantor, which shall be in a form and contain covenants to be satisfactory to and to be approved by the attorneys of the first party, and shall name the Anglo California Trust Company of San Francisco, California, as trustee. Said mortgage and deed of trust shall provide:

(a) For the annual retirement, commencing January first, one thousand nine hundred and twenty-two, of one entire series consisting of ten (10) per cent of the total bonds issued, and for the cancellation of the bonds so retired.

(b) For sales of the ships and stocks given as security for said bond issue by agreement between the representative of the first party and the corporation mortgagor, and with the provision that the proceeds of any such sales shall, unless reinvested,

as hereinafter provided, be used to retire the last series of bonds then outstanding. If amount received from any such sale or sales or from insurance is insufficient to retire an entire series of such bonds, then as many bonds shall be retired as the amount will cover. In case of fractions of one thousand (1,000) dollars, if the amount is five hundred (500) dollars or over, then the corporation mortgagor shall supply the moneys necessary to retire one full bond; and if the fraction is under five hundred (500) dollars, it shall be retained by the trustee and applied toward the payment of the interest next falling due. New securities or property may be purchased [297] with the proceeds of any such sales or with insurance moneys only by agreement of the corporation mortgagor and the first party or its representative. In no case shall moneys received from sales or insurance be held by the trustee longer than six (6) months. The trustee shall place such moneys at the current bank rates of interest, and at the expiration of six (6) months after collection, any such moneys received from sales or from insurance, with the interest, shall be applied to redemption of the last series of bonds then outstanding. No sales of any portion of the security shall be made on credit without the consent of the first party or its representative.

(c) That the bond issue shall be a closed issue and shall not be increased without the written consent of the first party.

(d) That the said bonds shall be callable on thirty (30) days' notice, on the payment of one

thousand and fifty (1,050) dollars for each bond called and of the accrued interest. In case bonds are so called, notice thereof shall be given by United States Registered Mail to The Right Honorable the Prime Minister of Australia, addressed to Treasury Building, Melbourne, Australia, and also to The Commissioner for Australia, resident in the United States (the present commissioner being Mr. Mark Sheldon, and his address 61 Broadway, New York City), or his representative or successor.

(e) That in case of default in the payment of any interest when the same becomes due; or in case of default in the payment of any series of such bonds when the same becomes due; or in case of the failure of the new corporation, the mortgagor, to make any payment called for under said deed of [298] trust, including payments for insurance, repairs, upkeep, assessments on stocks, or any other payment required to be made by the mortgagor, as herein provided, and the continuance of such default for ninety (90) days after written notice thereof given to the corporation mortgagor, by the trustee; or in case the said vessels named in Exhibit "A," or any of them, are seized under process of law issued out of any court, and the same are not forthwith released; then and in either or any of such cases the entire amount of the unpaid balance shall become forthwith due and the trustee shall have authority to take and enter the mortgaged property for the benefit of the bondholders, with provisions usual in deeds of trust in that respect.

(f) That the corporation mortgagor will main-

tain the mortgaged ships in good order and repair so long as the same remain subject to the deed of trust. If said vessels or any of them are not so kept in good order and repair, upon demand by the trustee, the trustee shall have the right to make the necessary repairs and the corporation mortgagor shall repay the trustee the amount of any such advances on demand.

(g) That whenever twenty (20 per cent, being two full series of the outstanding bonds, shall have been redeemed and cancelled, ten (10) per cent of the then value of the security originally mortgaged shall be released from the deed of trust and thereafter, with the redemption of each subsequent ten (10) per cent, being one full series, of bonds remaining an additional ten (10) per cent of the security shall be released from the deed of trust; provided, always, however, that the security shall not be so reduced that the par value of the outstanding bonds shall exceed sixty (60) per cent of [299] the then value of such security. The determination of the portion of the security to be released, of the value thereof and of the value of the unreleased security shall be made by mutual agreement, or, failing such, by arbitration as hereinafter provided for, and no release shall be executed without the consent of the corporation mortgagor and of the first party hereto, or its representative, or pursuant to arbitration as hereinafter provided.

(h) That the second parties and/or said new corporation shall insure the vessels at their expense

with first-class underwriters approved by the representative of the first party, substantially in the manner set out in detail in letter attached hereto and marked Exhibit "B," and shall pay all premiums and all calls due or becoming due from time to time. All insurance policies shall be delivered to the Trustee, duly endorsed, making claims payable to the Trustee as its interests may appear. Insurance to cover full values, subject only to the proviso contained in said Exhibit "B" attached hereto, as enumerated in Exhibit "A" attached hereto, and to be for the proper protection of bondholders to that extent. Total of all insurance shall be reduced *pro rata* with reduction of outstanding bonds.

It is also agreed that no deviations of voyages are to be made to render insurance policies voidable. Each of the vessels shall also be entered in a first-class protection and indemnity association, approved by the representative of the first party, and at the expense of the second parties.

In the event of default or failure to insure as agreed, the Trustee under the deed of trust shall have the [300] right to do so, and to recover the premiums, with interest, from the new corporation, the mortgagor.

(j) The mortgagor shall agree to keep the vessels up to their present class certificates, and shall bind itself to obtain such certificates during the continuance of the deed of trust. The three vessels not at present classed (viz.: "W. A. West," "Rosa-mond" and "C. F. Crocker") shall also be maintained in a thoroughly seaworthy condition in every

respect to the satisfaction of the San Francisco Board of Marine Underwriters or other surveyor or surveyors mutually agreed upon. The Trustee and/or the first party, or its representative, shall have the right to have a survey made of any ship at any time, and, if same is found not to be in good condition, to make necessary replacements or repairs at mortgagor's expense, including cost of survey, after demand upon and failure of the mortgagor to do so. The mortgagor shall repay moneys so expended, with interest, to the Trustee upon demand. The mortgagor shall covenant to keep the boats properly and safely manned and equipped.

(k) The new corporation, the mortgagor, shall not permit indebtedness past due, which may be the subject of a lien or encumbrance on the mortgaged property, to accrue. In case such indebtedness is permitted to exist, the Trustee shall have the right to pay same, if the mortgagor fails to release or pay the same, forthwith upon demand, and the mortgagor shall agree to repay the Trustee any payments so made on demand.

(l) That the security mortgaged to the Trustee shall at all times stand in the name of the Trustee, but that the [301] new corporation, the mortgagor, while not in default under the mortgage or deed of trust, shall have the privilege of voting the stock and securities pledged under the deed of trust; that such stock, however, shall not be voted for any purpose that will impair the mortgaged security, such as the creation of bonded indebtedness by the corporation whose stock is pledged, nor shall stock

be voted for the increase of the capital stock of the corporation whose stock is pledged, or for dividends other than out of earnings, or for the diminution of said stock, or for liquidation of the corporation, without the consent of first party, or its representative. The corporation mortgagor shall act in voting such stock under a limited proxy to be executed by the Trustee.

(m) That where the mortgagor is not in default the mortgaged vessels shall be operated by it free of restrictions by the Trustee, but only where such operations are permitted by the existing insurance policies, and when the vessels are properly manned and equipped.

(n) That the fees and charges of the Trustee and its attorneys and the expenses of carrying out the trust, including possible foreclosure expenses, shall be paid by the corporation mortgagor.

(o) That all of the amounts agreed to be paid by the corporation mortgagor shall be secured by the deed of trust. All advances by the Trustee are to be repaid on demand, and shall bear interest from the date the advance is made until repaid at the rate of one (1) per cent per month.

(6) First party shall maintain a representative in San Francisco authorized to act on its behalf in connection with any of the matters provided for in said deed of trust. [302]

(7) All of the provisions of this agreement relating to the transfer of the security to a Trustee, the formation of said corporation and the execution and delivery of the said bonds to the first party shall

be completed on or before January fifteenth, one thousand nine hundred and twenty-one. If prior to January fifteenth, one thousand nine hundred and twenty-one, title to the "C" boats is not transferred to the Trustee, as in paragraph 1 hereof provided, the second parties may, at their option, cancel this agreement without liability of the first party for damages.

(8) That from the date hereof and during the life of said deed of trust, the Trustee and the first party and its auditor shall have access to all accounts, books and papers affecting or showing the income and expenses of the new corporation mortgagor to be formed, and, in addition, to any accounts, books and documents affecting or showing the earnings, expenses and disbursements on account of the vessels described in Exhibit "A," and each of them.

(9) In case there is any disagreement between the parties hereto concerning any question of fact hereunder, the same shall be determined by two arbitrators, one of whom shall be appointed by the first party and the other by the second parties, and in case said two arbitrators shall fail to agree, a third shall be chosen by the said two arbitrators and the decision of any two of such three arbitrators shall be final and conclusive upon such question. The decision of such arbitrators shall be a condition precedent to the accruing of any right of action to either party.

(10) Until the organization of the new corporation is complete and the bonds to be issued by it and to which the [303] first party is entitled here-

under shall have been issued and delivered to first party, all of the vessels described in the exhibit hereto attached shall be operated by the second parties for account of whom it may concern, and second parties shall make the necessary advances for such operation.

(11) All of the vessels described in the attached exhibit are now under American registry. There shall be no change in registry except to British, Canadian or Australian registry, and such change shall not be made in any case if the security under the deed of trust or bond mortgage is hereby impaired or imperiled in any way. With the consent of the first party, but not otherwise, the registry may be changed to that of any nation.

IN WITNESS WHEREOF, on the day and year first above-written, the parties hereto have caused these presents to be duly executed.

[Seal]

THE COMMONWEALTH OF AUSTRALIA,

By H. B. G. LARKIN,

PACIFIC MOTORSHIP COMPANY,

By R. J. RINGWOOD,

President,

By R. H. HOLMBERG,

Secretary,

[Seal]

PACIFIC FREIGHTERS COMPANY,

By B. F. MACKALL,

Vice-President,

By R. H. HOLMBERG,

Secretary. [304]

Exhibit "A."**ASSETS OF****PACIFIC MOTORSHIP COMPANY****AND****PACIFIC FREIGHTERS COMPANY.**

80% ownership of Barkentine "Alicia Havaside"	\$160,000.00
80% ownership of Barkentine "Russell Havaside"	160,000.00
80% ownership of Barkentine "Anne Comyn"	160,000.00
80% ownership of Barkentine "Phyllis Comyn"	160,000.00
80% "ownership of Barkentine "Katherine Mackall"	160,000.00
100% ownership of S/V "W. A. West"	60,000.00
100% ownership of S/V "Rosamond"	75,000.00
100% ownership of Barkentine "C. F. Crocker"	40,000.00
100% ownership of Motorship "Booby-alla"	350,000.00
100% ownership of Motorship "Balcatta"	350,000.00
100% ownership of Motorship "Babinda"	350,000.00
100% ownership of Motorship "Benowa"	350,000.00
100% ownership of Motorship "Cethana"	150,000.00
100% ownership of Motorship "Coolcha"	150,000.00

100% ownership of Motorship "Culburra"	150,000.00
100% ownership of Motorship "Chalamba"	150,000.00

STOCKS:

Dominion Mill Company—1800	
Shares	180,000.00
Henry C. Peterson Inc.—592 Shares	60,000.00
Fageol Motors Company—2500 pfd.,	
2500 common	25,000.00
Northern Fisheries Inc.—276 pfd.,	
250 common	27,500.00
Shipowners & Merchants Tugboat	
Co.—700 shares	70,000.00
Pacific Alaska Navigation Company	
—500 shares	67,500.00

Grand Total. \$3,405,000.00

[305]

Exhibit "B."

San Francisco, Cal., October 20, 1920.

The Pacific Motorship Co. and The Pacific Freighters Co.,

310 California Street,

San Francisco, Cal.

Dear Sirs:

INSURANCE.

With reference to clause 5 (h) of the agreement made to-day between us, I would state that the detailed understanding arrived at is as under.

(1) That you in the interim, and ultimately the

new corporation mortgagor, shall at your or its expense, and for the benefit and proper protection of bondholders, insure each of the eight B and C Motorships and each of the five Barkentines enumerated in Exhibit A, and keep each of them insured with first-class Underwriters, approved by our representative, against all risks, for sums not less than the values shown in Exhibit "A" (or reduced values from time to time as Bonds are retired), and shall hand over to the Trustee the policies of such insurance duly endorsed to the Trustee as its interests may appear, and pay all premiums or calls which may be, or become, due in respect of such policies. This provision to apply as long and as far as "all risk" cover is obtainable on each vessel at premiums not exceeding an average rate of ten (10) per cent. For example, if you wished to cover a vessel for \$300,000, and were able to obtain \$100,000 at 8%, \$100,000 at 10%, and \$100,000 at 12%, you would have obtained the insurance at an average rate of not exceeding 10%; but, on the other hand, if you were able only to obtain \$100,000 at 8%, \$100,000 at 10%, \$50,000 at 12% and \$50,000 at 14%, you would be called upon to pay in excess of an average of 10%. Under the proposal agreed upon, you would be privileged to refrain from taking any amount of such insurance which would bring the average rate per annum in excess of 10%.

(2) If at any time full cover against all risks on any of the vessels is unobtainable by yourselves or the Trustee, or our Representative, at an average rate not exceeding ten (10) per cent, then you

shall cover the balance of the risk against total loss, R. D. C. and stranding at an annual rate not exceeding ten (10) per cent.

(3) If by any chance total loss and R. D. C. cover is also unobtainable at the rate mentioned, then the question must be one for discussion between the Corporation Mortgagor and our Representative as to what method can be arrived at for the protection of Bondholders' interests.

(4) In the event of a casualty, in respect to a vessel not fully insured against all risk in circumstances described above, the Corporation Mortgagor shall deposit with the Trustee, for the benefit of the Bondholders, a Surety Bond, or other guarantee or security, approved by our Representative, for the uninsured proportion of the appraised damage and/or claims resulting from the casualty, to the extent of the then values shown in Exhibit [306] "A," and that such Surety Bond or guarantee shall be held by the Trustee until such vessel is again placed in a thoroughly seaworthy condition and/or all claims in respect to such uninsured proportion have been settled. The appraisal of such damage and/or claims to be made by a surveyor and/or other expert mutually approved by both parties.

(5) In the case of the vessels "Watson A. West," "Rosamond" and "Charles F. Crocker," you and/or the new Corporation Mortgagor will cover their disbursements and earnings against total loss for the benefit and protection of bondholders, to the amounts of values as shown in Exhibit "A"

(or reduced values from time to time as bonds are retired).

(6) That you and/or the new Corporation Mortgagor will keep each of the sixteen (16) vessels enumerated in Exhibit "A" covered and entered for their full tonnage values in some first-class Protection and Indemnity Association, approved by ourselves or our Representative, and that you will satisfy our Representative at all times that you have done so. The cost of this cover not to be included in nor considered part of the ten (10) per cent average cost referred to above.

(7) That you and/or the new Corporation Mortgagor shall also cover all vessels for values laid down against war risk if war declared and required by Bondholders.

Will you kindly confirm that the above is also your understanding of our agreement on these bonds.

Yours faithfully,

H. B. G. LARKIN.

H. B. G. LARKIN.

Accepted:

PACIFIC MOTORSHIP COMPANY.

R. J. RINGWOOD,

President.

R. H. HOLMBERG, (Seal)

Secretary.

PACIFIC FREIGHTERS COMPANY.

B. F. MACKALL,

Vice-president.

R. H. HOLMBERG, (Seal)

Secretary. [307]

Exhibit "C."

H. B. G. Larkin, Esq.,
San Francisco, Cal.

Dear Sir:

Confirming our conversation this morning, it is mutually agreed and understood between us that Clause 7 of the Insurance Letter, marked Exhibit "B," attached to the agreement between us, shall be altered to read as follows:

"(7) That you and/or the new Corporation Mortgagor shall also cover all vessels for values laid down against war risk if war declared, and required by Bondholders, or prior to declaration of war, if, at any time, it should appear to be mutually advantageous to do so."

Yours very truly,

PACIFIC MOTORSHIP COMPANY.

By R. J. RINGWOOD,

President.

[Seal]

By R. H. HOLMBERG,

Secretary.

PACIFIC FREIGHTERS COMPANY,

By R. J. RINGWOOD,

Director.

[Seal]

By R. H. HOLMBERG,

Secretary.

Agreed:

THE COMMONWEALTH OF AUSTRALIA.

By H. B. G. LARKIN.

[Endorsed]: Filed March 8, 1921, at 9 A. M.
Walter B. Maling, Clerk. By J. A. Schaertzer,
Deputy Clerk. [308]

In the Southern Division of the United States
District Court for the Northern District of
California, Second Division.

IN EQUITY—No. 595.

THE COMMONWEALTH OF AUSTRALIA
et al.,

Plaintiffs,

vs.

PACIFIC MOTORSHIP COMPANY, a Corpora-
tion, et al.,

Defendants.

Order Appointing Receiver.

Now, on this 26th day of March, 1921, come the plaintiffs, The Commonwealth of Australia, and The Commonwealth of Australia, by William Morris Hughes, its Attorney General, and William Morris Hughes, Attorney General of the said The Commonwealth of Australia, by E. J. McCutchen, J. M. Mannon, Jr., and McCutchen, Willard, Mannon & Greene, its attorneys, and the defendants herein, Pacific Motorship Company and Pacific Freighters Company, and each of them, appearing by their attorney, Oscar Sutro, Esq., and the defendant herein, the Anglo & London Paris National Bank, appearing by its attorney, J. C. McKinstry, Esq., and the action having been heretofore duly dismissed as to W. L. Comyn, who was named in the bill of complaint filed herein on March 8, 1921, as a defendant in said action, and the said bill of complaint, having been theretofore dismissed as to said W. L. Comyn,

as aforesaid, having been read, upon motion of said plaintiffs, by their said attorneys, it is hereby [309]

ORDERED, ADJUDGED AND DECREED that Drew Chidester, of San Francisco, California, be and he is hereby appointed receiver of all and singular the property listed and referred to in that certain list attached as Exhibit "A" to the agreement dated October 21, 1920, which agreement is attached to the said bill of complaint on file herein as Exhibit No. 1, to wit, the following property:

The motorship "Boobyalla."

The motorship "Balcatta."

The motorship "Babinda."

The motorship "Benowa."

The motorship "Cethana."

The motorship "Coolcha."

The motorship "Culburra."

The motorship "Challamba."

The S/V "W. A. West."

The S/V "Rosamond."

The Barkentine "C. F. Crocker."

80% ownership of the barkentine "Alicia Haviside."

80% ownership of the barkentine "Russell Haviside."

80% ownership of the barkentine "Anne Comyn."

80% ownership of the barkentine "Phyllis Comyn."

80% ownership of the barkentine "Katherine Mackall."

1800 shares of the capital stock of Dominion Mill Co.

592 shares of the capital stock of Henry C. Peterson, Inc.

2500 shares of the common capital stock of Fageol Motors Co.

2500 shares of the preferred capital stock of Fageol Motors Co.

276 shares of the preferred capital stock of Northern Fisheries, Inc.

250 shares of the common capital stock of Northern Fisheries, Inc.

700 shares of the capital stock of Shipowners & Merchants Tugboat Co.

500 shares of the capital stock of the Pacific Alaska Navigation Co. [310]

That said receiver be and he is hereby fully authorized and directed to take immediate possession of all and singular the property above described and referred to, wheresoever situated or found, and to protect the title and possession of the same; also to take possession of and hold subject to the order of this Court any and all insurance policies now in effect upon the above-described property or any of it, and any and all moneys due, or to become due, under said policies or any of them from the respective insurers named therein; also to take possession of and hold subject to the order of this Court any and all other properties, books of account, vouchers, papers, deeds, leases, contracts, charter parties, policies of insurance and/or contracts of insurance, and/or other properties, belonging to, or pertaining to, said properties or any thereof.

Each and all and every of the defendants herein and their and each of their agents or employees and each and every of the officers, directors, agents or

employees of the corporation defendants herein and all other persons, firms or corporations whatsoever having in their possession or control any of the property hereinabove described are hereby required and commanded forthwith to turn over and deliver to said receiver, or to his duly constituted representative or representatives, each and every of said property hereinabove described, and any and all other properties, books of account, vouchers, papers, deeds, leases, contracts, charter parties, policies of insurance and/or contracts of insurance, and/or other properties in their or any of their hands or under the control of them or any of them, belonging to or pertaining to said properties, or any of them, and all and every of [311] such defendants and their and each of their agents and employees and each and every of said officers, directors, agents or employees of the said corporation defendants herein and all such other persons, firms or corporations having in their possession or control any of said properties are enjoined from interfering in any way whatever with the possession or management of any part of the said properties over which said receiver is hereby appointed or from interfering in any way to prevent the discharge of his duty.

Said receiver is fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment for the proper protection of the said property, and likewise to defend such actions as may be instituted against him as such receiver, and also to appear in and conduct the prosecution or defense of any suit now pending in

any court involving the title or possession or right to possession of said properties or any of them.

That the said receiver shall retain possession of all and singular such property and shall continue to discharge the duties and trusts aforesaid until the further order of this Court in the premises, and that he shall make report to this Court of his doings in the premises and may from time to time apply to this Court for such further orders as he may deem necessary and requisite to the administration of such trust; and said receiver is hereby vested, in addition to the powers aforesaid, with all the general powers of receivers in cases of this kind, subject to the supervision of this Court.

Said receiver is hereby further directed within five days from this date to file with the clerk of this court a [312] proper bond with sureties or a corporate surety to be approved by the clerk of this court or the Judge thereof in the penal sum of Fifty Thousand (\$50,000) Dollars. Said bond shall be conditioned for the faithful discharge by the said receiver of his duties and for the due accounting of all funds and other property coming into his hands according to the order of this Court.

Done in open court at San Francisco, California, this 26th day of March, 1921.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Mar. 26, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [313]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 595.

THE COMMONWEALTH OF AUSTRALIA, and
THE COMMONWEALTH OF AUSTRALIA by WILLIAM MORRIS HUGHES, Its Attorney General, and WILLIAM MORRIS HUGHES, Attorney General of Said THE COMMONWEALTH OF AUSTRALIA, for Said THE COMMONWEALTH OF AUSTRALIA,

Plaintiffs,

vs.

PACIFIC MOTORSHIP COMPANY, a Corporation, PACIFIC FREIGHTERS COMPANY, a Corporation, ANGLO-CALIFORNIA TRUST COMPANY, a Corporation, THE ANGLO & LONDON PARIS NATIONAL BANK, a National Banking Association, etc.,

Defendants.

Report of Receiver.

To the Hon. WILLIAM C. VAN FLEET, Judge of the United States District Court, Southern Division, Northern District of California, Second Division:

Your receiver, Drew Chidester, submits the following report of the condition of the property com-

mitted to said receivership by the order of this Court made on the 26th day of March 1921:

Immediately upon qualifying for said receivership, I undertook the investigation of the situation and condition of the property ordered into the custody of said receiver, and I then and there took, and now have in my possession, the following property:

1800 shares of Capital Stock of the Dominion Mill Company.

592 shares of Capital Stock of Henry C. Peterson, Inc.

2500 shares of Capital Stock of Fageol Motors Company.

2500 shares of Preferred Stock of Fageol Motors Company. [314]

276 shares of Preferred Stock of Northern Fisheries, Inc.

250 shares of Common Stock of Northern Fisheries, Inc.

700 shares of Capital Stock of Shipowners & Merchants' Tugboat Co.

500 shares of Capital Stock of Pacific Alaska Navigation Co. and same has been deposited in the safety deposit vault in the American National Bank, San Francisco, California, in vault No. 7563.

With regard to the vessels listed, I desire to advise as follows:

MOTORSHIP "BOOBYALLA."

I find that this vessel arrived at Valparaiso, Chile,

on the 21st day of February, 1921, in apparently good condition.

However, on March 11th, 1921, cable was received from Captain Wie, master of the vessel, advising that this vessel had been libeled for \$12,250.00.

On March 16th, the master further advised that case was called in court and he had admitted services amounting to 24,116 pesos and 115 pounds sterling, and that claimants no doubt would secure judgment for full amount claimed.

On March 21st, Diechman, American Consul at Valparaiso, Chile, cabled advising that the Pacific Steam Navigation Company had obtained judgment for approximately \$13,000.00, and further that the vessel could be put up for sale to satisfy this judgment. The master also requested to send sufficient funds to satisfy this judgment.

The freight to Valparaiso on this vessel was all prepaid so that there was apparently no funds available on freight collectable at destination.

This vessel was fixed for a cargo of Ore from ore ports to Tacoma, Washington, but this booking has been cancelled on account of insurance difficulties.

The ship, therefore, is still at Valparaiso, without employment, and held there by the above judgment for \$13,000.00. [315]

The seamen's wages are unpaid, and further liens to cover their wages will probably be filed against the steamer at Valparaiso.

We have no means to meet this, or other obligations, and I have been spending the time since my appointment as receiver in an endeavor to secure

some co-operation from the plaintiff along this line.

It was suggested by counsel for plaintiff, that the plaintiff might possibly be induced to advance funds, and that he would cable to Australia upon the subject.

Up to the present time we have received no definite assurances, one way or the other.

MOTORSHIP "BALCATTA."

This vessel is now at Talcahuano.

On February 18, 1921, a cable was received advising that the vessel was lying capsized, with 40 feet of keel torn away, but temporarily repaired.

Estimated total cost salvage and refitting, \$60,000.00.

I am advised that when this vessel turned turtle that the crew abandoned her, and said crew are now standing by the ship.

In the meantime, notice of abandonment has been made to the underwriters, but in view of the fact that the vessel has been righted the underwriters refuse to take charge of the ship, or accept abandonment.

On February 24, 1921, cable was sent by the Pacific Motorship Company to the Pacific Steam Navigation Company advising them that it will only be necessary to keep such a crew as Lloyd's Agent will certify are required account Underwriter's repairs.

On February 26, 1921, the Pacific Steam Navigation Company cabled advising that Lloyd's recommend the whole crew stand by until first salvage operations brought to head. [316]

On March 12, 1921, the Pacific Steam Naviga-

tion Company cabled advising that Lloyd's agents at Talcahuano received the following cable from London:

"Underwriters have not accepted abandonment. Owners must provide funds and make necessary arrangements crew but desirable they should retain engineer according to surveyor's advice Important Obtain instructions San Francisco underwriters Only small proportion insured this country Do your utmost expedite operations."

They further advise that salvage contractors will in all probability have to be paid and crew demanding money also provisions imperative make arrangements at once as they are privileged creditors.

On March 25th, 1921, the following telegram was received from the Honorable Charles E. Hughes, Secretary of State, Washington, D. C.:

"Consul at Concepcion telegraphs Balcatta is being towed to Talcahuano Three months will be required to repair vessel Your agent ordered crew stand by ship at Talcahuano but you are reported issued instructions advance crew no funds but later authorized keeping such as agreed upon by underwriters Underwriters recommend keeping all crew and captain kept them Wages and board unpaid for month and captain in trying to obtain bottomry to pay wages and board Telegraph department action you intend take with regard crew and whether vessel has been abandoned to underwriters If so who are underwriters."

Further messages have been received from the master confirming that he and crew standing by and that Lloyd's agents have not accepted abandonment and that maintenance money indispensable.

Under date of March 16th, 1921, cable has been received from the Pacific Steam Navigation Company, Valparaiso, Chile, advising that this vessel is now upright ready for pumping out, and that the American Consul has written them warning them of consequences to owners under United States law if crew not paid off up to date of wreck and time kept afterwards by captain's orders. Also that in accordance with contracts made by the captain payments now due salvage contractors.

I further learn that the Pacific Steam Navigation Company's claim amounts to \$44,000.00, and that the estimated amount of repairs will be \$150,000.00. [317]

On April 8th, 1921, the local insurance adjusters received the following telegram:

“Balcatta survey being made meantime salvors threaten execute embargo selling vessel public auction which account financial condition country would prove disastrous Consul insists repatriating crew.”

We have received a suggestion that it might be possible to secure a settlement with the insurers on this vessel by which they assume liability for the sum of \$150,000.00, and we are pursuing this suggestion with all diligence, with the hope that a settlement might be affected. Of this, however, there is no present assurance.

MOTORSHIP "BABINDA."

This vessel arrived in San Francisco February 28th, 1921, and since that date she has remained here, tied up at Pier No. 21.

Crew are still on board unpaid.

Her physical condition is apparently good.

We find that the following suits have been instituted against this vessel:

Outer Harbor Dock & Wharf Co.—Dock-

age	\$ 217.05
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E. W. Mason—Pilotage.....	91.66
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Pacific Steam Navigation Company—

Money Advanced	62,500.00
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West, Elliott & Gordon—Supplies.....	1,422.12
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McIntosh & Seymour Corporation—Sup-

plies	1,047.00
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C. F. Klitgaard—Stevedoring.....	629.00
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United Engineering Company—Repairs..	544.39
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California Stevedoring & Ballast Co.—

Stevedoring	168.94
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Haviside & Company—Supplies.....	3,443.53
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I also note that this vessel has a claim against Messrs. Christianson, Hanify & Weatherwax on account of deductions they have made, amounting to \$1,931.63, for which amount I have made a demand upon them.

MOTORSHIP "BENOWA."

This vessel arrived in San Francisco on February 28th, 1921, and is still here, in the stream.

She discharged at this port 3,800 tons of coal for account of the Government. [318]

The crew is still on board and unpaid.

Owing to her engines having dropped some 2", she is not in condition for future business until repairs have been made.

This vessel has been libeled on account of wages due crew amounting to \$12,000.00.

The following has been received from Houlder, Weir & Boyd:

"Benowa collected freight two thousand four hundred sixty-one dollars twenty-nine cents
Stop Are deducting for our commissions and expenses eleven hundred ten dollars also retaining five thousand disbursements Sandersons
Stop Please telegraph immediately specific instructions regarding disposal balance."

On the following day we received from the same source the following telegram:

"Since wiring you Pacific Steam Navigation Corporation served on us sheriff's warrant of attachment all monies Pacific Motorship Company in our possession Telegraph instructions who are your lawyers here."

HOULDER, WEIR & BOYD, INC.

The matter was taken up with Mr. Goodfellow, of the firm of Goodfellow, Eells, Moore & Orrick, who are the local attorneys for the attaching creditors, Pacific Steam Navigation Company, with a view of holding up the proceedings against said freight money in sufficient time to enable us to investigate and determine what steps we should take. We have this day wired the attorneys in New York for information, so that we may know the exact position. We must appear within a month. For this it is

necessary to have funds with which to employ counsel, and our action depends upon the action of Mr. Mannon, attorney for the plaintiff in this case.

The following actions have been brought and are pending in the Southern Division of the United States District Court for the Northern District of California:

Carstens Packing Company—Supplies....	\$ 1,026.27
R. Jepsen—Pilotage	101.70
McIntosh & Seymour Corporation—Supplies	3,112.25
Pacific Construction & Engineering Co.—	
Materials	1,144.75
W. C. W. Renny—Master's Wages.....	2,528.73
Richard J. Spencer et al.—Seamen's	
Wages	10,395.83
West, Elliott & Gordon—Supplies.....	32.54
E. C. Genereaux.....	3,226.91

[319]

The necessities of the crews of the "Benowa" and "Babinda" seem to be very pressing. They are claiming not only for wages but for double pay under the statute, and subsistence and return fare to Baltimore.

This vessel has not been fixed for any future employment.

MOTORSHIP "CETHANA."

This vessel arrived at San Francisco February 24, 1921, and is tied up at Pier No. 21.

The crew have been discharged from this vessel, and a watchman is now in charge.

The physical condition of this vessel is apparently good.

The following actions, however, have been taken against the vessel:

Outer Dock Harbor & Wharf Co—

Dockage	\$ 182.13
H. P. Marshall—Pilotage	70.54
R. C. Griffith & Co.—Supplies.....	160.75
Haviside & Company—Supplies	1,255.12
California Stevedoring & Ballast Company—Stevedoring	291.40
West, Elliott & Gordon—Supplies.....	522.58
Rothchild Stevedoring Co.—Stevedoring.	1,891.66
McIntosh & Seymour Corporation—Supplies	1,433.25
Pacific Steam Navigation Company—	
Money Advanced	62,500.00
Union Oil Company—Supplies.....	2,164.67
Commercial Importing Co.—Supplies....	166.95
MOTORSHIP "COOLCHA."	

This vessel arrived at Callao, Peru, on March 14th, 1921.

It is learned that this vessel needs \$5,000.00 to cover her disbursements at Callao.

The South bound freight for this vessel was all prepaid and she is discharging only part cargo at Callao.

We are advised by the captain that at Talara the oil company refused to supply bunkers and also oil shipments which had been previously arranged for movement from that port.

The vessel's physical condition is apparently good, as no advices have been received to the contrary.

This vessel, like the others, owes considerable amounts to the crew, and they will probably take action against the vessel to cover their wages, unless the same is attended to. [320]

MOTORSHIP "CULBURRA."

This vessel arrived at Antofogasta, Chile, on February 15th, 1921.

Under date of March 5th, 1921, the captain has cabled that the Pacific Steam Navigation Company has libeled this vessel for disbursements.

On March 14, 1921, cable was also received from the master advising that the crew demanded to know whether allotments have been paid to date to which reply was made that January allotments have been paid.

On March 18th, 1921, the master has cabled as follows:

"Our agents received instructions Valparaiso Stop All disbursements inclusive supplies I demand immediate reply instructing me where to apply for provisions and also wages."

We are this day in receipt of a reply from the master as follows:

"Crew placed embargo 'Culburra' for wages and transportation home vessel to be sold at auction by order of Chilean court Advise immediately how many allotments paid to date."

The vessel's physical condition is apparently good.

MOTORSHIP "CHALLAMBA."

Arrived at Callao, Peru, March 10th, 1921.

On March 14th, 1921, the master cabled as follows:

"Pacific Steam Navigation Company refuses to act as agents consignees of goods acting only on their behalf require remittance at once."

This vessel had a full cargo for discharge at Callao, but requires \$8,000.00 as the estimated amount of her expenses at that port.

SAILING VESSEL "WATSON A. WEST."

Is now en route from Iquique, Chile, to Honolulu, T. H., with 900 tons of Nitrates.

I learn that the freight amounted to \$17.50 per ton on 900 tons, and is collectable on delivery and that the freight has been pledged to the Anglo & London Paris National Bank against a loan of \$10,000.00 made by the bank to cover a draft upon the Pacific Freighters Co. for disbursements in South [321] America.

The vessel has no commitments after her discharge at Honolulu.

SAILING VESSEL "ROSAMOND."

This vessel sailed from Cape Town December 20th, 1920, direct for San Francisco or Puget Sound, as may be ordered, and is due at any time. She is not committed to any further employment as yet.

BARKENTINE "CHARLES F. CROCKER."

Sailed from Eureka February 17th, 1921, and is now en route to Australia with a cargo of lumber. Freight has apparently all been prepaid and used.

She is not fixed for future movements after discharge at Australia.

BARKENTINE "ALICIA HAVISIDE."

This vessel arrived at Iquique March 2, 1921, with coal from Australia. Kendricks & Company, Valparaiso, are coast agents.

The freight on this coal has been half prepaid, balance collectable upon discharge, and said collectable freight to be used for disbursements for the "Alicia Haviside," "Phyllis Comyn" and "Katherine Mackall."

We have the following instructions from the master, April 9th:

"Expect to be ready for ballast by April twelfth Telegraph instructions."

April 11th:

"Shall we take ballast reply immediately."

I expect to wire him today to take ballast and proceed to San Francisco.

The vessel is not fixed for future movements.

BARKENTINE "RUSSELL HAVISIDE."

Arrived at Newcastle, N. S. W., on February 27th, 1921, and is now supposed to be loading a cargo of coal for the West Coast of South America.

It is estimated that this vessel will lift 3,500 tons [322] at 110 shillings per ton. Freight one-third prepaid, balance collect on delivery.

I learn that the collect freight has been assigned to Mr. Haviside.

BARKENTINE "ANNE COMYN."

This vessel is now laid up at Winslow, Wash-

ington, on account of no profitable business offering for her.

Apparently this vessel should be drydocked and painted as the captain advises that if this is not done the ship will be damaged by teredos.

BARKENTINE "PHYLLIS COMYN."

This vessel arrived at Mejillones, Chile, March 1st, 1921, and on March 25th a cable was received that the vessel would be ready for stiffening by March 27th, and that the master is waiting instructions as to the loading. So far the vessel has not been fixed for a return cargo, and there is nothing offering at present except at ridiculous rates. It will probably be better to give the ship ballast so that she can proceed to San Francisco or Puget Sound.

BARKENTINE "KATHERINE MACKALL."

Arrived at Taltal, Chile, March 10th, 1921, with a cargo of coal from Australia.

I learn that the freight on this coal has been prepaid. On account of consignees not taking delivery at Taltal, the ship is proceeding to Mollendo to discharge.

The following cable has been received from the master:

"Katherine arrived yesterday afternoon this port and moored Stop 10:00 P. M. steamer 'Koyo' collided us carrying away entire bowsprit. It is impossible to be repaired here Must be towed to Callao after discharge Ship immediately boom and telegraph instructions Stop To whom shall I apply for funds Stop Mollendo agencies our agents."

Authority should be given to make some arrangements to forward boom to Callao.

In addition to the various claims filed against the various vessels, I find that there are also the following general claims, for which attachments were filed in the Superior Court of the State of California, in and for the City and County of [323] San Francisco:

Seattle Grocery Company—Seattle	\$1,037.43
Cook & Company	480.76
Haviside & Company	5,652.48
West, Elliott & Gordon	3,772.37
Martin-Camm Co.	653.54
D. Edwards & Sons.....	2,104.29
*Fred H. Finke	654.56

*This suit is against W. L. Comyn & Co.,
Pacific Motorship Co., and Mark L. Sheldon,
Commissioner for Australian Government.

INSURANCE.

Upon investigation of the record of insurance policies, I have ascertained that the following is the status of insurance coverage as of March 27, 1921:

8 Motorships.			Earned
	Hull & Disb.	P. & I.	Club. Premiums
4 B. Boats.....	\$1,455,000.	\$1,780,000 \$53,967.43
4 C. Boats.....	758,000.	1,000,000	\$304,005 33,154.06
			<hr/> \$87,121.49 <hr/>

All of the above insurance has been cancelled, and the amount of \$87,121.49 is the amount of earned premiums on date of cancellation of the policies.

8 Sailing Vessels.			Earned
	Hull.	P. & I.	Premiums.
3 Sailing Vessels....	175,000	50,000.) Net 27-192
5 Bktns.	1,267,500	1,025,730.	
			73,477.85

The insurance on the sailing vessels has all been placed with Geo. E. Billings & Co.

Notice of cancellation of some small policies has been received, but not sufficient to really affect the insurance status of these eight sailing vessels. [324]
PACIFIC MOTORSHIP COMPANY.

Statement of this Company, as at February 28, 1921, shows an excess of liabilities over assets amounting to \$117,214.86.

Dated: San Francisco, April 12th, 1921.

DREW CHIDESTER,
Receiver.

NATHAN H. FRANK,
Attorney for Receiver.

[Endorsed]: Filed Apr. 12, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [325]

(Title of Court and Cause.)

Petition of Receiver Respecting Claims.

Drew Chidester, receiver herein, respectfully shows to the Court:

That under the order appointing him, no provision has been made by the Court for the presentation to him of claims against the said defendants, or the said property coming into his custody, and that it is desirable that an order be made requiring the presentation of all such claims within a time to be fixed by the Court to enable your petitioner, as receiver, to perform the duties entrusted to him under the order of his appointment.

WHEREFORE, your petitioner prays that the Court may order all persons having claims against the property of the Pacific Motorship Company or the Pacific Freighters Company which has been committed to the custody of said receiver, to file such claims, duly verified, to your petitioner, and that all those having claims which are asserted to have priority over the lien of the complainants in said cause, or have liens upon any of the property confided to the custody of said receiver will set up the nature of their prior liens or security to which they deem themselves entitled, under a penalty of thereafter having said claims disallowed, in the discretion of the Court.

Dated: April 22d, 1921.

DREW CHIDESTER,
Receiver.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Receiver.

[Endorsed]: Filed April 23d, 1921. Walter B. Maling, Clerk. [326]

(Title of Court and Cause.)

Petition of the Receiver for Further Powers.

To the Honorable WILLIAM C. VAN FLEET,
Judge of the United States District Court in
and for the Northern District of California:
Drew Chidester, receiver herein, respectfully shows
to the Court:

I.

That under the order of this Court appointing him receiver, no provision was made for the employment of an attorney in and about the business of said receivership.

That it is necessary and has been necessary from the beginning of said receivership for the employment of an attorney, not only to advise and guide the said receiver in the transaction of the business before him, but also to take care of the large number of suits that have been brought against the property under said receivership.

II.

That the accounts respecting the business of said vessels are in a complicated state, so that your petitioner is unable to ascertain what moneys are due to said vessels, and the same requires a thorough investigation by an expert.

It is also necessary for your petitioner to have a stenographer and other office force to carry on the business of said receivership, as well as authority to rent the necessary offices for that purpose.

III.

That for the purpose of the proper care of the vessels now in the custody of said receiver, it is necessary to employ an engineer and a watchman for each vessel, and that it is also necessary to incur expenses for the towage of said vessels from the position where they now lie to sweet water in Suisun Bay or up the river where the same may be protected [327] against the inroads of teredos.

IV.

That as already exhibited to your Honor in the

report on file herein, twelve (12) of said vessels are in foreign ports, some of them not under employment, and others on voyages carrying freight.

That it is necessary that your petitioner be authorized to seek and contract for freight for these vessels, in order that they may be brought within the jurisdiction.

That of these vessels the "Coolcha" and the "Challanba" are now lying at Callao, Peru, unemployed.

That there is about Five Thousand (\$5,000.00) Dollars indebtedness against said steamer "Coolcha" and about Eight Thousand (\$8,000.00) Dollars indebtedness against the said steamer "Challanba," but no action has been taken toward the enforcement of the same, and said vessels are, up to the present time, free to go to sea.

That beside said indebtedness there are the wages due to the crew, of the amount of which your petitioner is not advised.

That your petitioner is of the opinion that a freight could be procured for these vessels that would discharge said indebtedness and satisfy the said crew, and sufficient amount to bring said vessels to the port of San Francisco.

That the "Colburra" is now lying at Antofogasta, Chili, under libel for her crew's wages.

That the "Alicia Haviside" is now at Iquique, Chili, and free to accept freight for any available port.

That the "Phyllis Comyn" is now at Mejillones, Chili, in the same situation as the "Alicia Haviside."

That the "Katherine Mackall" is now at Molendo, Peru; she has been in a collision with one of the steamers of the Toyo Kisen Kaisha Line, namely: the "Kiyo Maru," and has had her bowsprit carried away and other damage, the amount of which your petitioner is not advised. [328]

That the purchase of a bowsprit and transportation thereof to Peru would cost about One Thousand (\$1,000) Dollars.

That if the vessel was brought to the port of San Francisco, it would be of the value of at least One Hundred Thousand (\$100,000) Dollars.

That the sailing vessel "Watson A. West" is now en route from Iquique, Chili, to Honolulu, with a cargo of nitrates.

That the freight on said cargo is payable on delivery at Honolulu and will amount to the sum of approximately Fifteen Thousand Seven Hundred and Fifty (\$15,750) Dollars.

That there is a claim that said freight moneys have been assigned as security to the Anglo London Paris National Bank of San Francisco, secured in advance by about Ten Thousand (\$10,000) Dollars.

That there is a possibility of securing a cargo of Hawaiian Island products from Honolulu to San Francisco.

That the "Charles F. Crocker" is now *en route* from Puget Sound to Australia, with a cargo of lumber.

That the freight on this vessel is, as your petitioner is advised, prepaid and in the possession of the Pacific Freighters' Company, with no future employment to the port of San Francisco in view.

That the "Russell Haviside" is now on a voyage for New Castle, N. S. W., to the West Coast of South America, with a cargo of coal; the freight moneys will amount to about Seventy Thousand (\$70,000) Dollars. A third of this freight has been prepaid and your petitioner is advised that the balance, less the disbursements at South America, has been assigned to John Haviside.

That the "Anne Comyn" is on Puget Sound at Winslow, Washington, without employment.

That with respect to the motorships it will be necessary to have them put to sea without insurance, as the policies on said vessels have been canceled for nonpayment of premiums, [329] and it would be difficult, if not impossible, to get insurance on them at reasonable rates.

That with respect to the steamer "Balcatta" your petitioner has given full details of her situation and condition in the report already on file herein.

That since said report was filed your petitioner has received an offer from the insurers to pay One Hundred and Fifty Thousand (\$150,000) Dollars, less the unpaid earned premiums upon all of the "B" boats (which it is claimed amounts to about Seventy-five Thousand (\$75,000) Dollars), in full payment of their liability on their several policies on said vessels.

WHEREFORE, your petitioner prays that this Honorable Court will be pleased to make an order

1. Empowering said petitioner to employ such attorney or attorneys as in his judgment may be necessary to transact the business of said receiver-

ship, and further to ratify the employment of an attorney heretofore made by said petitioner.

2. Empowering said petitioner to employ an expert accountant to make such investigations as are necessary to ascertain what moneys are due to said vessels.

3. To employ a stenographer and such other office force as he may deem to be necessary to carry on the business of said receivership, and further to rent such office or offices as he may deem necessary for such purposes.

4. To employ such engineers and watchmen as are in his judgment necessary for the care of said vessels, and to incur such expense as may be necessary to tow said vessels to a suitable position for their care, and generally to incur such expense in and about said vessels as in his judgment is necessary for their proper care and protection.

5. To seek and contract for freight for the vessels that are now abroad, and to employ such agent or agents and incur such expense, and make such contracts of affreightment [330] as in his judgment may be for the best interest of said vessels for the purpose of securing their return to the port of San Francisco, and the jurisdiction of this Honorable Court, and further generally to take whatever steps he may deem necessary and incur whatever expense he may deem necessary to secure this end.

6. To incur the necessary expense and take the necessary steps for the repair of the sailing vessel "Katherine Mackall."

7. That said petitioner be authorized, if he deems

it advantageous, to have the motorships above mentioned put to sea without insurance.

8. That your said petitioner be instructed in such manner and to such end as this Honorable Court may deem most advantageous with respect to the offer of the insurers on the steamer "Balcatta."

And for such other and further order in the premises as to this Honorable Court may seem just and for the best interests of the property in the custody of said receiver.

DREW CHIDESTER,
Petitioner.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Petitioner.

City and County of San Francisco,
State of California,—ss.

Drew Chidester, being first duly sworn, deposes and says that he is the receiver of the property mentioned in the foregoing petition, and that he believes the allegations in said petition are true.

DREW CHIDESTER.

Subscribed and sworn to before me this 23d day of April, 1921.

[Seal] JAMES MASON,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed April 23, 1921. Walter B. Maling, Clerk. [331]

(Title of Court and Cause.)

Stipulation for Substitution of Plaintiffs.

W. E. Gerber, Jr., having purchased all rights of the above-named plaintiffs in the contract dated October 21, 1920, a copy of which is annexed to the complaint herein, including the cause of action of said plaintiffs herein, it is hereby stipulated that said W. E. Gerber, Jr., be, and he hereby is, substituted as plaintiff in the above-entitled cause.

Dated May 3d, 1921.

EDW'D J. McCUTCHEN,

J. M. MANNON, Jr.,

McCUTCHEN, WILLARD, MANNON &
GREENE,

Attorneys for Plaintiffs, The Commonwealth of Australia, and The Commonwealth of Australia by William Morris Hughes, Its Attorney General, and William Morris Hughes, Attorney General of said The Commonwealth of Australia, for Said The Commonwealth of Australia.

PILLSBURY, MADISON & SUTRO,

Attorneys for W. E. Gerber, Jr.

So ordered.

WM. C. VAN FLEET,

District Judge.

[Endorsed]: Filed May 3, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [332]

(Title of Court and Cause.)

Dismissal.

The above-entitled cause is hereby dismissed, without prejudice.

Dated May 5, 1921.

PILLSBURY, MADISON & SUTRO,

Attorneys for Plaintiff.

[Endorsed]: Filed May 5, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [333]

(Title of Court and Cause.)

Order for Release of Vessels.

The above-entitled suit having been dismissed, it is hereby ordered that the receiver heretofore appointed herein release the vessels held by him as such receiver, upon payment by plaintiff into court of the sum of Fifteen Thousand Dollars (\$15,000), out of which may be paid any amount hereafter allowed to said receiver on account of his fees or expenses, or the fees of his attorneys; any balance remaining after such payment to be returned to the plaintiff.

Dated May 5, 1921.

WM. C. VAN FLEET,

District Judge.

[Endorsed]: Filed May 5, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [334]

(Title of Court and Cause.)

Affidavit of W. E. Gerber, Jr.

State of California,

City and County of San Francisco,—ss.

W. E. Gerber, Jr., being first duly sworn, deposes and says that he is the substituted plaintiff in the above-entitled cause; that American motorship "Benowa" is now in the bay of San Francisco; that certain persons whose names are to affiant unknown, but who formerly were members of the crew of said "Benowa" and who are some of the libelants in that certain proceeding before the above-entitled court in admiralty, numbered 17,132, claim the right to remain on board said "Benowa"; that said persons are so remaining on board said "Benowa," and using and interfering with the machinery, equipment, furniture, stores and provisions thereof; that said claim is without any right whatever; that the machinery, equipment and furniture of said "Benowa" is of great value; that said machinery and equipment is highly complicated and delicate and may easily be broken or destroyed, and its value thereby impaired.

W. E. GERBER, Jr.

Subscribed and sworn to before me this 19th day of May, 1921.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of a copy of the within affidavit is admitted this 19th day of May, 1921.

IRA S. LILLICK,
Proctor for Libellant.

[Endorsed]: Filed May 20, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [335]

(Title of Court and Cause.)

Affidavit of John E. Dierkes.

State of California,
City and County of San Francisco,—ss.

John E. Dierkes, being first duly sworn, deposes and says that he has been in business in maritime affairs for thirty years; that he was employed as a marine machinist for six years, as a marine engineer at sea for about twelve years, and that for twelve years he was general foreman of the repair shop for marine machinery at the Panama Canal; that he is familiar with the motorship “Benowa” and her engines and other equipment; that on May 12, 1921, he inspected said motorship “Benowa” and her engines and equipment; that the working parts of the main engines in said motorship were on said date more or less rusty and covered with dirt and apparently not having been turned over for at least two weeks; that the electric deck winches on said motorship “Benowa” had been exposed to the weather and not covered; that said motorship in general was dirty and not properly cared for; that all of the hatches of said motorship

were closed tight, allowing no circulation to the holds; that engines of the type used on the "Benowa" are subject to rust and deterioration unless turned over at an interval of not more than three days; that said motors required frequent lubrication and can only be lubricated internally by such turning over; that said deck winches when exposed to the weather without cover are subject to rust, decomposition of the insulation and general deterioration; that the hatches of a motorship of the type of the "Benowa" are required to be kept open when such a vessel is in port and the holds are empty in order to prevent mildew and other deterioration of the holds; that in general said motorship, her engines and equipment showed signs of having been improperly used and showed the results of deterioration caused thereby. [336]

That on behalf of the receiver heretofore appointed in the above-entitled action and on behalf of various other parties thereto, he has been in charge of the maintenance of the motorship "Babinda," a sister ship of said motorship "Benowa," identical with said motorship in every respect; that said motorship "Babinda" has been properly cared for since the first of March, 1921, in the bay of San Francisco, by himself and a watchman in charge of said motorship "Babinda"; that the engines on said motorship "Babinda" have been regularly turned over and lubricated and the vessel in general cared for in the manner hereinabove described as necessary.

JOHN E. DIERKES.

Subscribed and sworn to before me this 21st day of May, 1921.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of copy of the within affidavit of John E. Dierkes is hereby admitted this 21st day of May, 1921.

IRA S. LILLICK.

[Endorsed]: Filed May 21, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [337]

(Title of Court and Cause.)

Affidavit of E. C. Genereaux.

State of California,

City and County of San Francisco,—ss.

E. C. Genereaux, being first duly sworn, deposes and says that he is an intervening libelant in that certain suit pending before the above-entitled court, entitled, “In the Southern Division of the United States District Court, for the Northern District of California, First Division. In Admiralty. McIntosh & Seymour Corporation, a Corporation, Libelant, vs. American Motorship ‘Benowa,’ Her Engines, Tackle, Apparel and Furniture, etc., Respondent, No. 17,116”; that he has been in business in maritime affairs for upward of thirty-five years, and has been a marine surveyor for the board of marine underwriters of San Francisco at Seattle

for thirteen years, and has been a marine surveyor at Portland for five years, and at the city and county of San Francisco for one year; that he is familiar with the motorship "Benowa" and her machinery and equipment; that on May 12, 1921, he inspected the engines and machinery of said motorship "Benowa"; that the working parts of the main engines in said motorship were on said date more or less rusty and covered with dirt and apparently not having been turned over for at least two weeks; that the electric deck winches on said motorship "Benowa" had been exposed to the weather and not covered; that said motorship in general was dirty and not properly cared for; that all of the hatches of said motorship were closed tight, allowing no circulation to the holds; that engines of the type used on the "Benowa" are subject to rust and deterioration unless turned over at an interval of not more than three days; that said motors required frequent lubrication and can only be lubricated internally by such turning [338] over; that said deck winches when exposed to the weather without cover are subject to rust, decomposition of the insulation and general deterioration; that the hatches of a motorship of the type of the "Benowa" are required to be kept open when such a vessel is in port and the holds are empty in order to prevent mildew and other deterioration of the holds; that in general said motorship, her engines and equipment showed signs of having been improperly used and showed the results of deterioration caused thereby.

That on behalf of the receiver heretofore appointed in the above-entitled action and on behalf of various other parties thereto, he has been in charge of the maintenance of the motorship "Babinda," a sister ship of said motorship "Benowa," identical with said motorship in every respect; that said motorship "Babinda" has been properly cared for since the first of March, 1921, in the bay of San Francisco, by John E. Dierkes and a watchman in charge of said motorship "Babinda"; that the engines on said motorship "Babinda" have been regularly turned over and lubricated and the vessel in general cared for in the manner hereinabove described as necessary.

E. C. GENEREAUX.

Subscribed and sworn to before me this 21st day of May, 1921.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of copy of the within affidavit of E. C. Genereaux is hereby admitted this 21st day of May, 1921.

IRA S. LILLICK.

[Endorsed]: Filed May 21, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [339]

(Title of Court and Cause.)

(Order for Release of Securities.)

The above-entitled suit having been dismissed and

the Court having been advised that provision has been made for the payment of all claims filed with the receiver herein,—

IT IS HEREBY ORDERED that the receiver heretofore appointed herein, release and turn over to the defendants Pacific Motorship Company and Pacific Freighters Company, the following described properties, to wit:

1800 shares of the capital stock of Dominion Mill Co.

592 shares of the capital stock of Henry C. Peterson, Inc.

2500 shares of the common capital stock of Fageol Motors Co.

2500 shares of the preferred capital stock of Fageol Motors Co.

276 shares of the preferred capital stock of Northern Fisheries, Inc.

250 shares of the common capital stock of Northern Fisheries, Inc.

700 shares of the capital stock of Shipowners & Merchants Tugboat Co.

500 shares of the capital stock of Pacific Alaska Navigation Co.

Dated: June 2d, 1921.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed June 2d, 1921. Walter B. Maling, Clerk. [340]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, Jr., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSON, JOHN LAHTI-MEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her Engines, Boilers, Tackle, Machinery, Apparel and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corporation,

Claimant.

(ANGLO-CALIFORNIA TRUST COMPANY, a Corporation,

Substituted Claimant.)

THE COMMONWEALTH OF AUSTRALIA, and
WILLIAM MORRIS HUGHES, Attorney
General of Said THE COMMONWEALTH
OF AUSTRALIA, for Said THE COM-
MONWEALTH OF AUSTRALIA,

Intervening Libelants.

(W. E. GERBER, Jr.,

Substituted Intervening Libelant.)

**Notice of Appeal (of Anglo-California
Trust Company).**

To the Clerk of the Above-entitled Court, to the
Libelants Above Named, and to IRA S. LIL-
LICK, Esq., Proctor for Said Libelants: [341]

You and each of you will please take notice that
Anglo-California Trust Company, claimant above
named, hereby appeals from the final decree made
and entered herein in this cause on the 2d day of
June, 1921, to the next United States Circuit Court of
Appeals for the Ninth Circuit to be held in and for
the said circuit at the city and county of San Fran-
cisco, State of California.

Dated: June 6, 1921.

PILLSBURY, MADISON & SUTRO,
Proctors for Claimant.

[Endorsed]: Receipt of a copy of the within
notice of appeal is admitted this 6th day of June,
1921.

IRA S. LILLICK,
Proctor for Libelants.

Filed Jun. 6, 1921. W. B. Maling, Clerk. By
C. M. Taylor, Deputy Clerk. [342]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, Jr., FRANK GARLOCK, BIRGER JOHANSON, FRITZ SHILLING, AXEL JOHNSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her Engines, Boilers, Tackle, Machinery, Apparel and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corporation,

Claimant.

(ANGLO-CALIFORNIA TRUST COMPANY, a Corporation,

Substituted Claimant.)

THE COMMONWEALTH OF AUSTRALIA, and
WILLIAM MORRIS HUGHES, Attorney
General of Said THE COMMONWEALTH
OF AUSTRALIA, for Said THE COM-
MONWEALTH OF AUSTRALIA,
Intervening Libelants.

(W. E. GERBER, Jr.,
Substituted Intervening Libelant.)

Notice of Appeal (of W. E. Gerber, Jr.).

To the Clerk of the Above-entitled Court, to the
Libelants Above Named, and to IRA S. LIL-
LICK, Esq., Proctor for Said Libelants: [343]

You and each of you will please take notice that
W. E. Gerber, Jr., intervening libelant above named,
hereby appeals from the final decree made and
entered herein in this cause on the 2d day of June,
1921, to the next United States Circuit Court of
Appeals for the Ninth Circuit to be held in and for
said circuit at the city and county of San Fran-
cisco, State of California.

Dated: June 6th, 1921.

PILLSBURY, MADISON & SUTRO,
Proctors for Intervening Libelant.

[Endorsed]: Receipt of a copy of the within
notice of appeal is admitted this 6th day of June,
1921.

IRA S. LILLICK,
Proctor for Libelants.

Filed Jun. 6, 1921. W. B. Maling, Clerk. By
C. M. Taylor, Deputy Clerk. [344]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, Jr., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSON, JOHN LAHTI-MEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her Engines, Boilers, Tackle, Machinery, Apparel and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corporation,

Claimant.

(ANGLO-CALIFORNIA TRUST COMPANY, a Corporation,

Substituted Claimant.)

THE COMMONWEALTH OF AUSTRALIA, and
WILLIAM MORRIS HUGHES, Attorney
General of Said THE COMMONWEALTH
OF AUSTRALIA, for Said THE COM-
MONWEALTH OF AUSTRALIA,
Intervening Libelants.

(W. E. GERBER, Jr.,
Substituted Intervening Libelant.)

**Assignments of Error (of Anglo-California Trust
Company, a Corporation).**

Comes now Anglo-California Trust Company, a corporation, claimant and appellant herein, and contends that in the [345] record, decision, supplemental decision, interlocutory decree and final decree in this cause there is manifest and material error, and said appellant now makes, files and presents the following assignments of error on which it relies, to wit:

I.

That the District Court erred in rendering and entering the interlocutory decree herein, dated May 25, 1921.

II.

That the District Court erred in rendering and entering the final decree herein, dated June 2, 1921.

III.

That the District Court erred in not dismissing the libel herein with costs to claimant, as prayed for in claimant's answer, and in not granting to claimant a decree of dismissal herein with its costs as so prayed for.

IV.

That the District Court erred in rendering and entering any decree herein, because the motorship "Benowa" was never seized under process issued herein.

V.

That the District Court erred in rendering and entering any decree herein, because at the time of the filing of the libel herein the motorship "Benowa" was, ever since has been and now is under seizure and in the possession of the marshal of the District Court under process issued in the cause now pending in the District Court, entitled, "McIntosh & Seymour Corporation, a corporation, Libellant, vs. American Motorship 'Benowa,' her engines, tackle, apparel and furniture, etc., Respondent, No. 17,116."

VI.

That the District Court erred in rendering and [346] entering any decree herein, because at the time of the filing of the libel herein there was pending against the said motorship "Benowa" other libels, which said libels ever since have been and now are pending in said District Court.

VII.

That the District Court erred in rendering and entering any decree herein, without consolidating this cause with numerous other libels against the motorship "Benowa" pending in said District Court at the time of the entry of the said decree and now pending therein.

VIII.

That the District Court erred in rendering and entering any decree herein, because the above-entitled cause was not at issue at the time of the entry of said decree and is not yet at issue.

IX.

That the District Court erred in rendering and entering any decree herein, because said libels against said motorship "Benowa," filed prior to the filing of this libel, were not at issue at the time of the entry of said decree, and are not yet at issue.

X.

That the District Court erred in rendering and entering any decree herein without having notified the parties to said prior libels of the hearing of this cause, or of the intention to render or enter any decree herein.

XI.

That the District Court erred in rendering and entering any decree herein because there has been no publication of process herein, as required by the rules of [347] said District Court.

XII.

That the District Court erred in rendering and entering any decree herein, because there is an intervening libel herein upon which proclamation has not yet been made.

XIII.

That the District Court erred in holding, deciding and decreeing that libelants were entitled to recover any sum whatever out of the motorship "Benowa,"

her engines, boilers, machinery, tackle, apparel and furniture.

XIV.

That the District Court erred in holding, deciding and decreeing that libelants recover any sum for wages or penalty subsequent to March 17, 1921.

XV.

That the District Court erred in holding, deciding and decreeing that libelants recover any sum for wages or penalty subsequent to March 26, 1921.

XVI.

That the District Court erred in holding, deciding and decreeing that libelants recover any sum for wages or penalty subsequent to April 27, 1921.

XVII.

That the District Court erred in holding and deciding that on the arrival of the vessel there was a sufficiency of provisions on the steamship "Benowa," the claimants being unable, apparently, to supply the same.

XVIII.

That the District Court erred in holding and deciding that on the arrival of the vessel that the receiver did nothing for the physical care of the ship or for supplying any [348] provisions.

XIX.

That the District Court erred in holding and deciding that upon the arrival of the ship in the port of San Francisco demand was made upon the master for fifty per cent of the wages earned on the voyage.

XX.

That the District Court erred in holding and deciding that said demand was refused by the master.

XXI.

That the District Court erred in holding and deciding that subsequent to March 17, 1921, the master and crew discharged the routine duties of the vessel which was lying at anchor.

XXII.

That the District Court erred in holding and deciding that no provisions were furnished.

XXIII.

That the District Court erred in holding and deciding that the men were without means of support.

XXIV.

That the District Court erred in holding and deciding that the agreement with J. & R. Wilson, Inc., set forth in the decision filed herein March 14, 1921, was entered into on the 10th day of March, 1921.

XXV.

That the District Court erred in holding and deciding that the receiver, in his testimony as to what he did, made the statement set forth in said decision.

XXVI.

That the District Court erred in holding and [349] deciding that the contention that the libelants were not entitled to the statutory penalty after March 17, 1921, is not well founded.

XXVII.

That the District Court erred in holding and deciding that there is no ground for controversy with respect to the amount due.

XXVIII.

That the District Court erred in holding and deciding that the contention that the penalty is a

personam liability and may not be impressed as a preferred lien with the wages, is out of harmony with the plain sense of the statute.

XXIX.

That the District Court erred in holding and deciding that the penalty is in effect an increase of wages.

XXX.

That the District Court erred in holding and deciding that there is an agreement in this case as to the amount due for wages.

XXXI.

That the District Court erred in holding and deciding that the only contention is that the inability of the claimant to pay because of lack of funds is sufficient cause to avoid the penalty.

XXXII.

That the District Court erred in holding and deciding that the intent of the statute is not to hold the wage earner responsible for the financial inability of the ship to meet its wage obligations.

XXXIII.

That the District Court erred in holding and deciding [350] that it would be manifestly unjust and in some instances inhuman to discharge a seaman without payment of wages, without means of support, excusing the ship from the plain provisions of the statute fixing a penalty for default which in no sense was caused by the seaman.

XXXIV.

That the District Court erred in holding and deciding that the intervenors and claimant contend

that because the financial condition of the claimant is sufficient cause to avoid the payment of the penalty.

XXXV.

That the District Court erred in holding and deciding that the seamen are entitled to the further sum equal to one day's pay from the 17th day of March, 1921, for each and every day until the entry of the decree herein.

XXXVI.

That the District Court erred in holding and deciding that the seamen are entitled for the amount of the provisions actually necessary and secured for their maintenance upon the vessel.

XXXVII.

That the District Court erred in holding and deciding that the purpose of the statute is that a seaman should be protected against enforced idleness and nonsubsistence by being required to wait for payment of his wages when he is without fault and no sufficient cause exists other than the financial inability of the ship.

XXXVIII.

That the District Court erred in holding and deciding that the fact that a receiver was appointed for the claimant cannot shift the burden for non-payment from the ship to the wage earner. [351]

XXXIX.

That the District Court erred in not holding and deciding that there was sufficient cause for the delay in the payment of the wages of libelants.

XL.

That the District Court erred in not holding and deciding that the excessive claims made by libelants was sufficient cause for delay in payment of their wages.

XLI.

That the District Court erred in not holding and deciding that the inability of claimant to ascertain what funds had been supplied the vessel was sufficient cause for delay in the payment of wages of libelants.

XLII.

That the District Court erred in not holding and deciding that the assignment of the freight to libelants' proctor, made by claimant, was sufficient cause for delay in the payment of libelants' wages.

XLIII.

That the District Court erred in not holding and deciding that the financial condition of Pacific Motorship Company was sufficient cause for the delay in the payment of libelants' wages.

XLIV.

That the District Court erred in not holding and deciding that the pendency of the receivership proceeding and the appointment of a receiver therein was sufficient cause for the delay in the payment of libelants' wages.

XLV.

That the District Court erred in not holding and deciding that the tender made by the substituted intervening libelant, April 27, 1921, and the pay-

ment into court on the [352] following day was equivalent to the payment of libelants' wages.

XLVI.

That the District Court erred in not requiring libelants to look entirely to the sum heretofore deposited in court for their wages.

XLVII.

That the District Court erred in not requiring libelants to accept their transporration and subsistence en route immediately, or within a reasonable time after the entry of its decree.

XLVIII.

That the District Court erred in ordering, deciding and decreeing that in lieu of transportation any of libelants should receive cash amounts set forth in said final decree.

XLIX.

That the District Court erred in ordering, deciding and decreeing that if any of said libelants should have furnished their own transportation and subsistence they should be paid the cash sums mentioned.

L.

That the District Court erred in ordering that the motorship "Benowa," her engines, tackle, machinery, and appurtenances be sold.

LI.

That the District Court erred in holding, deciding and decreeing that the libelants recover their costs.

LII.

That the District Court erred in holding, deciding

and decreeing that the libelants recover any costs [353] incurred subsequent to April 27, 1921.

PILLSBURY, MADISON & SUTRO,
Proctors for Claimant and Appellant.

[Endorsed]: Receipt of a copy of the within assignments of error is admitted this 6th day of June, 1921.

IRA S. LILLICK,
Proctor for Libellants.

Filed Jun. 6, 1921. W. B. Maling, Clerk. By
C. M. Taylor, Deputy Clerk. [354]

In the Southern Division of the United States
District Court, in and for the Northern District
of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H.
COUNCILL, TIM HARRIGAN, FRANK-
LIN ADREAN, Jr., FRANK GARLOCK,
BIRGER JOHANSEN, FRITZ SHIL-
LING, AXEL JOHNSON, JOHN LAHTI-
MEN, WILLIAM H. CRAWFORD, J. B.
HUGHES, WALTER S. AUSTIN, LEON
A. CARTER, CAMPBELL A. HOBSON, W.
OWENS, W. C. WARD, N. E. AUSTIN,
CHARLES V. SMITH, H. D. WRIGHT,
ROBERT DOUGLE, JOHN LOPEZ, WILL-

IAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her Engines, Boilers, Tackle, Machinery, Apparel and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corporation,

Claimant.

ANGLO-CALIFORNIA TRUST COMPANY, a Corporation,

Substituted Claimant.)

THE COMMONWEALTH OF AUSTRALIA and WILLIAM MORRIS HUGHES, Attorney General of Said THE COMMONWEALTH OF AUSTRALIA, for Said THE COMMONWEALTH OF AUSTRALIA,

Intervening Libelants.

(W. E. GERBER, Jr.,

Substituted Intervening Libelant.)

Assignments of Error (of W. E. Gerber, Jr.).

[355]

Comes now W. E. Gerber, Jr., intervening libelant herein, and contends that in the record, decision, supplemental decision, interlocutory decree and final decree in this cause there is manifest and material error, and said appellant now makes, files and presents the following assignments of error on which he relies, to wit:

I.

That the District Court erred in rendering and entering the interlocutory decree herein, dated May 25, 1921.

II.

That the District Court erred in rendering and entering the final decree herein, dated June 2, 1921.

III.

That the District Court erred in not dismissing the libel herein with costs to claimant, as prayed for in claimant's answer, and in not granting to claimant a decree of dismissal herein with its costs as so prayed for.

IV.

That the District Court erred in rendering and entering any decree herein, because the motorship "Benowa" was never seized under process issued herein.

V.

That the District Court erred in rendering and entering any decree herein because at the time of the filing of the libel herein the motorship "Benowa" was, ever since has been and now is under seizure and in the possession of the marshal of the District Court under process issued in the cause now pending in the District Court, entitled "McIntosh & Seymour Corporation, a Corporation Libelant, vs. American Motorship 'Benowa,' Her Engines, Tackle, Apparel and Furniture, etc., Respondent, No. 17,116." [356]

VI.

That the District Court erred in rendering and

entering any decree herein, because at the time of the filing of the libel herein there was pending against the said motorship "Benowa" other libels, which said libels ever since have been and now are pending in said District Court.

VII.

That the District Court erred in rendering and entering any decree herein, without consolidating this cause with numerous other libels against the motorship "Benowa," pending in said District Court at the time of the entry of the said decree and now pending therein.

VIII.

That the District Court erred in rendering and entering any decree herein because the above-entitled cause was not at issue at the time of the entry of said decree and is not yet at issue.

IX.

That the District Court erred in rendering and entering any decree herein, because said libels against said motorship "Benowa," filed prior to the filing of this libel, were not at issue at the time of the entry of said decree, and are not yet at issue.

X.

That the District Court erred in rendering and entering any decree herein without having notified the parties to said prior libels of the hearing of this cause, or of the intention to render or enter any decree herein.

XI.

That the District Court erred in rendering and
[357] entering any decree herein, because there has

been no publication of process herein, as required by the rules of said District Court.

XII.

That the District Court erred in rendering and entering any decree herein, because there is an intervening libel herein upon which proclamation has not yet been made.

XIII.

That the District Court erred in holding, deciding and decreeing that libelants were entitled to recover any sum whatever out of the motorship "Benowa," her engines, boilers, machinery, tackle, apparel and furniture.

XIV.

That the District Court erred in holding, deciding and decreeing that libelants recover any sum for wages or penalty subsequent to March 17, 1921.

XV.

That the District Court erred in holding, deciding and decreeing that libelants recover any sum for wages or penalty subsequent to March 26, 1921.

XVI.

That the District Court erred in holding, deciding and decreeing that libelants recover any sum for wages or penalty subsequent to April 27, 1921.

XVII.

That the District Court erred in holding and deciding that on the arrival of the vessel there was a sufficiency of provisions on the steamship "Benowa," the claimants being unable apparently to supply the same.

XVIII.

That the District Court erred in holding and [358] deciding that on the arrival of the vessel that the receiver did nothing for the physical care of the ship or for supplying any provisions.

XIX.

That the District Court erred in holding and deciding that upon the arrival of the ship in the port of San Francisco demand was made upon the master for fifty per cent of the wages earned on the voyage.

XX.

That the District Court erred in holding and deciding that said demand was refused by the master.

XXI.

That the District Court erred in holding and deciding that subsequent to March 17, 1921, the master and crew discharged the routine duties of the vessel which was lying at anchor.

XXII.

That the District Court erred in holding and deciding that no provisions were furnished.

XXIII.

That the District Court erred in holding and deciding that the men were without means of support.

XXIV.

That the District Court erred in holding and deciding that the agreement with J. & R. Wilson, Inc., set forth in the decision filed herein March 14, 1921, was entered into on the 10th day of March, 1921.

XXV.

That the District Court erred in holding and deciding that the receiver, in his testimony as to what he did, made the statement set forth in said decision. [359]

XXVI.

That the District Court erred in holding and deciding that the contention that the libelants were not entitled to the statutory penalty after March 17, 1921, is not well founded.

XXVII.

That the District Court erred in holding and deciding that there is no ground for controversy with respect to the amount due.

XXVIII.

That the District Court erred in holding and deciding that the contention that the penalty is a *personam* liability and may not be impressed as a preferred lien with the wages, is out of harmony with the plain sense of the statute.

XXIX.

That the District Court erred in holding and deciding that the penalty is in effect an increase of wages.

XXX.

That the District Court erred in holding and deciding that there is an agreement in this case as to the amount due for wages.

XXXI.

That the District Court erred in holding and deciding that the only contention is that the liability

of the claimant to pay because of lack of funds is sufficient cause to avoid the penalty.

XXXII.

That the District Court erred in holding and deciding that the intent of the statute is not to hold the wage-earner responsible for the financial inability of the ship [360] to meet its wage obligations.

XXXIII.

That the District Court erred in holding and deciding that it would be manifestly unjust and in some instance inhuman to discharge a seaman without payment of wages, without means of support, excusing the ship from the plain provisions of the statute fixing a penalty for default which in no sense was caused by the seaman.

XXXIV.

That the District Court erred in holding and deciding that the intervenors and claimant contend that because the financial condition of the claimant is sufficient cause to avoid the payment of the penalty.

XXXV.

That the District Court erred in holding and deciding that the seamen are entitled to the further sum equal to one day's pay from the 17th day of March, 1921, for each and every day until the entry of the decree herein.

XXXVI.

That the District Court erred in holding and deciding that the seamen are entitled for the amount of the provisions actually necessary and secured for their maintenance upon the vessel.

XXXVII.

That the District Court erred in holding and deciding that the purpose of the statute is that a seaman should be protected against enforced idleness and nonsubsistence by being required to wait for payment of his wages when he is without fault and no sufficient cause exists other than the financial inability of the ship.

XXXVIII.

That the District Court erred in holding and [361] deciding that the fact that a receiver was appointed for the claimant cannot shift the burden for nonpayment from the ship to the wage earner.

XXXIX.

That the District Court erred in not holding and deciding that there was sufficient cause for the delay in the payment of the wages of libelants.

XL.

That the District Court erred in not holding and deciding that the excessive claims made by libelants were sufficient cause for delay in payment of their wages.

XLI.

That the District Court erred in not holding and deciding that the inability of claimant to ascertain what funds had been supplied the vessel was sufficient cause for delay in the payment of the wages of libelants.

XLII.

That the District Court erred in not holding and deciding that the assignment of the freight to libel-

ants' proctor, made by claimant, was sufficient cause for delay in the payment of libelants' wages.

XLIII.

That the District Court erred in not holding and deciding that the financial condition of Pacific Motorship Company was sufficient cause for the delay in the payment of libelants' wages.

XLIV.

That the District Court erred in not holding and deciding that the pendency of the receivership proceedings and the appointment of a receiver therein was sufficient cause for the delay in the payment of libelants' wages [362]

XLV.

That the District Court erred in not holding and deciding that the tender made by the substituted intervening libelant, April 27, 1921, and the payment into court on the following day was equivalent to the payment of libelants' wages.

XLVI.

That the District Court erred in not requiring libelants to look entirely to the sum heretofore deposited in court for their wages.

XLVII.

That the District Court erred in not requiring libelants to accept their transportation and subsistence en route immediately, or within a reasonable time after the entry of its decree.

XLVIII.

That the District Court erred in ordering, deciding and decreeing that in lieu of transportation any of

libelants should receive cash amounts set forth in said final decree.

XLIX.

That the District Court erred in ordering, deciding and decreeing that if any of said libelants should have furnished their own transportation and subsistence they should be paid the cash sums mentioned.

L.

That the District Court erred in ordering that the motor ship "Benowa," her engines, tackle, machinery, appurtenances be sold.

LI.

That the District Court erred in holding, deciding [363] and decreeing that the libelants recover their costs.

LII.

That the District Court erred in holding, deciding and decreeing that the libelants recover any costs incurred subsequent to April 27, 1921.

PILLSBURY, MADISON & SUTRO,

Proctors for Intervening Libelant.

[Endorsed]: Receipt of a copy of the within assignments of errors is admitted this 6th day of June, 1921.

IRA S. LILLICK,

Proctor for Libellants.

Filed Jun. 6, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [364]

In the Southern Division of the United States
District Court in and for the Northern District
of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H.
COUNCILL, TIM HARRIGAN, FRANK-
LIN ADREAN, JR., FRANK GARLOCK;
BIRGER JOHANSEN, FRITZ SHILLING,
AXEL JOHNSON, JOHN LAHTIMEN,
WILLIAM H. CRAWFORD, J. B. HUGHES,
WALTER S. AUSTIN, LEON A. CARTER,
CAMPBELL A. HOBSON, W. OWENS, W.
C. WARD, N. E. AUSTIN, CHARLES V.
SMITH, H. D. WRIGHT, ROBERT DOU-
GLE, JOHN LOPEZ, WILLIAM OVID;
S. J. WRIGHT, G. GARFIELD, and D. W.
DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her En-
gines, Boilers, Tackle, Machinery, Apparel
and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corpora-
tion,

Claimant.

(ANGLO-CALIFORNIA TRUST COMPANY, a
Corporation,

Substituted Claimant.)

**THE COMMONWEALTH OF AUSTRALIA and
WILLIAM MORRIS HUGHES, Attorney
General of said COMMONWEALTH OF
AUSTRALIA, for said THE COMMON-
WEALTH OF AUSTRALIA,**

Intervening Libelants.

(W. E. GERBER, Jr.,

Substituted Intervening Libellant.)

**Stipulation and Order Regarding Records of Other
Causes Introduced in Evidence.**

**IT IS HEREBY STIPULATED AND
AGREED,** by and between the respective parties
hereto, that instead of copying into the [365]
apostles on appeal the entire record of the District
Court in the other causes pending in said District
Court offered in evidence by substituted intervening
libelant, as set forth in the reporter's transcript,
there may be copied into the apostles the following
matters only:

A statement prepared from the docket of this
court showing:

- (a) The title of the cause.
- (b) The names of the proctors.
- (c) The date of filing each libel and intervening
libel.
- (d) The amount claimed in each libel and inter-
vening libel.
- (e) The dates of the issuance and return of moni-
tion on each libel and intervening libel.
- (f) What disposition, if any, has been made of
the cause or that it is still pending.

Said statement only need be copied into the apostles in lieu of the record in admiralty causes numbered 17,117, 17,118, 17,119, 17,120, 17,125, 17,126, 17,128, 17,129, 17,130, 17,134, 17,135, 17,139, 17,142, 17,145, 17,146. In lieu of the record in admiralty causes numbered 17,103 and 17,104 there may be copied into the apostles said statement, together with the libels in said causes.

In lieu of the record in admiralty causes numbered 17,116, there may be copies into the apostles said statement, together with the libel of McIntosh & Seymour Corporation; the monition issued thereon; the intervening libel of Pacific Steam Navigation Company and the monition issued thereon.

In lieu of copying into the apostles the record in equity cause number 595, there may be copied into the [366] apostles the docket of this court, and the following documents:

Complaint, filed March 8, 1921.

Order appointing receiver, filed March 26, 1921.

Report of receiver, filed April 12, 1921.

Petition of receiver respecting claims, filed April 23, 1921.

Petition of receiver for further powers, filed April 23, 1921.

Stipulation and order for substitution of plaintiff, filed May 3, 1921.

Dismissal, filed May 5, 1921.

Order for release of vessels, filed May 5, 1921.

Affidavit of W. E. Gerber, Jr., filed May 20, 1921.

Affidavit of John Dierkes, filed May 21, 1921.

Affidavit of E. C. Genereaux, filed May 21, 1921.

Order for release of securities, filed June 2, 1921.

Dated: June 21st, 1921.

IRA S. LILLICK,

Proctor for Libelants.

PILLSBURY, MADISON & SUTRO,

Proctors for Substituted Claimant and Substituted
Intervening Libellant.

It is so ordered.

M. T. DOOLING,

District Judge.

[Endorsed]: Filed Jun. 22, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [367]

In the Southern Division of the United States Dis-
trict Court, in and for the Northern District
of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H.
COUNCILL, TIM HARRIGAN, FRANK-
LIN ADREAN, Jr., FRANK GARLOCK,
BIRGER JOHANSEN, FRITZ SHIL-
LING, AXEL JOHNSON, JOHN LAHTI-
MEN, WILLIAM H. CRAWFORD, J. B.
HUGHES, WALTER B. AUSTIN, LEON
A. CARTER, CAMPBELL A. HOBSON,
W. OWENS, W. C. WARD, N. E. AUSTIN,
CHARLES V. SMITH, H. D. WRIGHT,

ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her Engines, Boilers, Tackle, Machinery, Apparel and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corporation,

Claimant,

(ANGLO-CALIFORNIA TRUST COMPANY, a Corporation.

Substituted Claimant.)

THE COMMONWEALTH OF AUSTRALIA, and WILLIAM MORRIS HUGHES, Attorney General of Said THE COMMONWEALTH OF AUSTRALIA, for Said THE COMMONWEALTH OF AUSTRALIA,

Intervening Libelants.

(W. E. GERBER, Jr.,

Substituted Intervening Libellant.)

**Stipulation and Order Regarding Original Exhibits
on Appeal.**

IT IS HEREBY STIPULATED AND AGREED, by and between the respective parties hereto, that all exhibits introduced in [368] evidence in the trial of the above-entitled cause in the District Court may be sent up in connection with

the appeals prosecuted herein as original exhibits to the Circuit Court of Appeals for the Ninth Circuit instead of being copied in the apostles on appeal.

Dated: June 6, 1921.

IRA S. LILLICK,

Proctor for Libelants.

PILLSBURY, MADISON & SUTRO,

Proctors for Substituted Claimant and Substituted
Intervening Libelant.

It is so ordered.

M. T. DOOLING,

District Judge.

[Endorsed]: Filed Jun. 7, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [369]

In the Southern Division of the United States Dis-
trict Court, for the Northern District of Cali-
fornia, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER et al.,

Libelants,

vs.

The American Motorship "BENOWA," Her En-
gines, etc.,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corpora-
tion,

Claimant.

(ANGLO-CALIFORNIA TRUST COMPANY, a
Corporation.

Substituted Claimant.)

THE COMMONWEALTH OF AUSTRALIA et al.,
Intervening Libelant.

(W. E. GERBER, Jr.,

Substituting Intervening Libelant.)

Stipulation and Order Regarding Apostles.

IT IS HEREBY STIPULATED AND
AGREED, by and between the respective parties
hereto, that the appeals of the substituted claimant
and substituted intervening libelant herein may be
heard upon a single record, and that only one
transcript of apostles need be prepared herein.
[370]

Dated: June 7th, 1921.

IRA S. LILLICK,

Proctor for Libelants.

PILLSBURY, MADISON & SUTRO,

Proctors for Substituted Claimant and Substituted
Intervening Libelant.

It is so ordered.

M. T. DOOLING,

District Judge.

[Endorsed]: Filed Jun. 7, 1921. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [371]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, Jr., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her Engines, Boilers, Tackle, Machinery, Apparel and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corporation,

Claimant,

(ANGLO-CALIFORNIA TRUST COMPANY, a Corporation.

Substituted Claimant.)

THE COMMONWEALTH OF AUSTRALIA, and
WILLIAM MORRIS HUGHES, Attorney
General of said THE COMMONWEALTH
OF AUSTRALIA, for said THE COM-
MONWEALTH OF AUSTRALIA,

Intervening Libelants.

(W. E. GERBER, Jr.,

Substituted Intervening Libelant.)

Bond on Appeal of Anglo-California Trust Company.

KNOW ALL MEN BY THESE PRESENTS:

That we, Anglo-California Trust Company, a corporation organized and existing under and by virtue of the laws of the [372] State of California, substituted claimant above named, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto Richard J. Spencer, C. V. Miller, R. H. Councill, Tim Harri- gan, Franklin Adrean, Jr., Frank Garlock, Birger Johansen, Fritz Shilling, Axel Johnsson, John Lahtimen, William H. Crawford, J. B. Hughes, Walter S. Austin, Leon A. Carter, Campbell A. Hobson, W. Owens, W. C. Ward, N. E. Austin, Charles V. Smith, H. D. Wright, Robert Dougle, John Lopez, William Ovid, S. J. Wright, G. Gar- field, and D. W. Davis libelants herein, in the sum of two hundred fifty dollars (\$250.), to be paid unto said libelants, for the payment of which well and truly to be made, we bind ourselves and each

of us our, and each of our, respective successors, jointly and severally firmly by these presents.

Sealed with our seals and dated this 9th day of June, 1921.

The condition of the above obligation is such that,
WHEREAS, Anglo-California Trust Company, a corporation, substituted claimant above named, has appealed to the Circuit Court of Appeals for the Ninth Circuit from the decree of the United States District Court, in and for the Southern Division of the Northern District of California, First Division, made and entered herein on the 2nd day of June, 1921;

NOW, THEREFORE, the condition of this obligation is such that if said Anglo-California Trust Company, a corporation, shall prosecute said appeal with effect and pay all costs that may be awarded against it as appellant, if the appeal is not sustained, then this obligation to be void; otherwise the same to be and remain in full force and effect.
[373]

ANGLO-CALIFORNIA TRUST COMPANY.

By GRANT CORDREY,
Trust Officer (As Principal).

[Seal of Anglo-California Trust Company]

FIDELITY & DEPOSIT COMPANY OF
MARYLAND,

By JOHN H. ROBERTSON,
Attorney-in-fact, (As Surety).

S. M. PALMER,

Agent.

[Seal of Fidelity & Deposit Co. of Maryland]

[374]

State of California,
City and County of San Francisco,—ss.

On this 9th day of June, 1921, before me, N. E. W. Smith, a notary public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Grant Gordrey, known to me to be the Trust Officer of Anglo-California Trust Company, the corporation described in and that executed the within and annexed instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Notary Seal] N. E. W. SMITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires April 12th, 1925.

[Endorsed]: Filed Jun. 9, 1921. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [375]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,132.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, Jr., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSON, JOHN LAHTI-MEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Libelants,

vs.

The American Motorship "BENOWA," Her Engines, Boilers, Tackle, Machinery, Apparel and Furniture,

Respondent.

PACIFIC MOTORSHIP COMPANY, a Corporation,

Claimant,

(ANGLO-CALIFORNIA TRUST COMPANY, a Corporation,

Substituted Claimant.)

THE COMMONWEALTH OF AUSTRALIA, and
WILLIAM MORRIS HUGHES, Attorney
General of said THE COMMONWEALTH
OF AUSTRALIA, for said THE COM-
MONWEALTH OF AUSTRALIA,

Intervening Libelants.

(W. E. GERBER, Jr.,

Substituted Intervening Libelant.)

**Bond on Appeal of W. E. Gerber, Jr., for Costs and
to Stay Execution.**

KNOW ALL MEN BY THESE PRESENTS:
That we, W. E. Gerber, Jr., of the City and County
of [376] San Francisco, State of California, sub-
stituted intervening libelants above named, as prin-
cipal, and Fidelity and Deposit Company of Mary-
land, a corporation, organized and existing under
and by virtue of the laws of the State of Maryland,
as surety, are held and firmly bound unto Richard
J. Spencer, C. V. Miller, R. H. Councill, Tim Harri-
gan, Franklin Adrean, Jr., Frank Garlock, Birger
Johansen, Fritz Shilling, Axel Johnsson, John
Lahtimen, William H. Crawford, J. B. Hughes,
Walter S. Austin, Leon A. Carter, Campbell A.
Hobson, W. Owens, W. C. Ward, N. E. Austin,
Charles V. Smith, H. D. Wright, Robert Dougle,
John Lopez, William Ovid, S. J. Wright, G. Gar-
field and D. W. Davis, libelants herein, in the sum
of two hundred fifty dollars (\$250), and in the
further sum of fifteen thousand dollars (15,000),
to be paid unto said libelants, for the payment of
which well and truly to be made we bind ourselves,

and each of us, our, and each of our, respective successors, heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 9th day of June, 1921.

The condition of the above obligation is such that,

WHEREAS, W. E. Gerber, Jr., substituted intervening libelant above named, has appealed to the Circuit Court of Appeals for the Ninth Circuit from the decree of the United States District Court, in and for the Southern Division of the Northern District of California, First Division, made and entered herein on the 2d day of June, 1921; and

WHEREAS, said substituted intervening libelant desires, during the process of such appeal, to stay the execution of said decree of said United States District Court:

NOW, THEREFORE, the condition of this obligation is [377] such that if said W. E. Gerber, Jr., shall prosecute said appeal with effect and pay all costs that may be awarded against him as appellant, if the appeal is not sustained, and shall abide by and perform whatever decree may be entered against him in this cause by the United States Circuit Court of Appeals for the Ninth Circuit, or on the mandate of said court by the said District Court below, then this obligation to be void;

otherwise the same to be and remain in full force and effect.

W. E. GERBER, Jr.,
(As Principal).

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

By JOHN H. ROBERTSON,
Attorney-in-Fact (As Surety).

[Seal]

S. M. PALMER,
Agent. [378]

State of California,
City and County of San Francisco,—ss.

On this 9th day of June, 1921, before me, N. E. W. Smith, a notary public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared W. E. Gerber, Jr., known to me to be the person described in, whose name is subscribed to and who executed the within and annexed instrument, and he acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Notary Seal] N. E. W. SMITH,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires April 12, 1925.

[Endorsed]: Filed Jun. 9, 1921. W. B. Maling,
Clerk. By C. M. Taylor, Deputy Clerk. [379]

**Certificate of Clerk U. S. District Court to Apostles
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 379 pages, numbered from 1 to 379, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of Richard J. Spencer et al., Libelants, vs. The American Motorship "Ben-owa," etc., Respondent, No. 17,132, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Praeceptum for Apostles on Appeal (copy of which is embodied herein), and the instructions of the proctors for claimant and intervening libelant, appellants herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of One Hundred Fifty-one Dollars and Thirty-five Cents (\$151.35) and that the same has been paid to me by the proctor for appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 9th day of August, A. D. 1921.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,
Deputy Clerk. [380]

[Endorsed]: No. 3749. United States Circuit Court of Appeals for the Ninth Circuit. W. E. Gerber, Jr., and Anglo-California Trust Company, a Corporation, Appellants, vs. Richard J. Spencer, C. V. Miller, R. H. Councill, Tim Harrigan, Franklin Adrean, Jr., Frank Garlock, Birger Johansen, Fritz Shilling, Axel Johnsson, John Lahtimen, William H. Crawford, J. B. Hughes, Walter S. Austin, Leon A. Carter, Campbell A. Hobson, W. Owens, W. C. Ward, N. E. Austin, Charles V. Smith, H. D. Wright, Robert Dougle, John Lopez, William Ovid, S. J. Wright, G. Garfield and D. W. Davis, Appellees. Apostles on Appeals. Upon Appeals from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 9, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 17,132.

W. E. GERBER, Jr.,

Appellant,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H.
COUNCILL, TIM HARRIGAN, FRANK-

LIN ADREAN, Jr., FRANK GARLOCK,
BIRGER JOHANSEN, FRITZ SHIL-
LING, AXEL JOHNSON, JOHN LAHTI-
MEN, WILLIAM H. CRAWFORD, J. B.
HUGHES, WALTER S. AUSTIN, LEON
A. CARTER, CAMPBELL A. HOBSON,
W. OWENS, W. C. WARD, N. E. AUSTIN,
CHARLES V. SMITH, H. D. WRIGHT,
ROBERT DOUGLE, JOHN LOPEZ,
WILLIAM OVID, S. J. WRIGHT, G. GAR-
FIELD, and D. W. DAVIS,

Appellees.

ANGLO-CALIFORNIA TRUST COMPANY, a
Corporation,

Appellant,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H.
COUNCILL, TIM HARRIGAN, FRANK-
LIN ADREAN, Jr., FRANK GARLOCK,
BIRGER JOHANSEN, FRITZ SHIL-
LING, AXEL JOHNSON, JOHN LAHTI-
MEN, WILLIAM H. CRAWFORD, J. B.
HUGHES, WALTER S. AUSTIN, LEON
A. CARTER, CAMPBELL A. HOBSON,
W. OWENS, W. C. WARD, N. E. AUSTIN,
CHARLES V. SMITH, H. D. WRIGHT,
ROBERT DOUGLE, JOHN LOPEZ,
WILLIAM OVID, S. J. WRIGHT, G. GAR-
FIELD, and D. W. DAVIS,

Appellees.

Stipulation and Order Extending Time to and Including July 16, 1921, to File Record and Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time for printing the record and filing and docketing this cause on appeal in the United I. S. L. States Circuit Court of Appeals for the J. A. P. Ninth Circuit may be, and the same is hereby, extended to and including the 16th day of ~~August~~ July, 1921.

Dated: July 6, 1921.

IRA S. LILLICK,
Proctor for Appellees.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellants.

It is so ordered.

WM. W. MORROW,
Circuit Judge.

Dated July 7th, 1921.

[Endorsed]: No. 3749. In the United States Circuit Court of Appeals, for the Ninth Circuit. W. E. Gerber, Jr., Appellant, vs. Richard J. Spencer et al., Appellees. Anglo-California Trust Company, a Corporation, Appellant, vs. Richard J. Spencer et al., Appellees. Stipulation and Order Extending Time for Docketing Cause. Filed Jul. 7, 1921. F. D. Monckton, Clerk. Refiled Aug. 9, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 17,132.

W. E. GERBER, Jr.,

Appellant,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H.
COUNCILL, TIM HARRIGAN, FRANK-
LIN ADREAN, Jr., FRANK GARLOCK,
BIRGER JOHANSEN, FRITZ SHIL-
LING, AXEL JOHNSON, JOHN LAHTI-
MEN, WILLIAM H. CRAWFORD, J. B.
HUGHES, WALTER S. AUSTIN, LEON
A. CARTER, CAMPBELL A. HOBSON,
W. OWENS, W. C. WARD, N. E. AUSTIN,
CHARLES V. SMITH, H. D. WRIGHT,
ROBERT DOUGLE, JOHN LOPEZ,
WILLIAM OVID, S. J. WRIGHT, G. GAR-
FIELD, and D. W. DAVIS,

Appellees.

ANGLO-CALIFORNIA TRUST COMPANY, a
Corporation,

Appellant,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H.
COUNCILL, TIM HARRIGAN, FRANK-
LIN ADREAN, Jr., FRANK GARLOCK,

BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Appellees.

Stipulation and Order Extending Time to and Including August 10, 1921, to File Record and Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit may be, and the same is hereby, extended to and including the 10th day of August, 1921.

Dated: July —, 1921.

IRA S. LILLICK,
Proctor for Appellees.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellants.

It is so ordered.

WM. W. MORROW,
Circuit Judge.

Dated: July 29, 1921.

[Endorsed]: No. 17,132. Southern Division. U. S. District Court, Northern District of California, First Division. No. 3749. United States Circuit Court of Appeals for the Ninth Circuit. W. E. Gerber, Jr., Appellant, vs. Richard J. Spencer, et al., Appellees. Anglo-California Trust Company, a Corporation, Appt., vs. Richard J. Spencer et al. Stipulation and Order Extending Time for Docketing Cause. Filed Jul. 29, 1921. F. D. Monckton, Clerk. Refiled Aug. 9, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit "A."

Libelant's Ex. "A." J. K., Commr. U. S. Commissioner Northern District of California at S. F.

[Endorsed]: No. 3749. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 9, 1921. F. D. Monckton, Clerk.

Form 705A

Department of Commerce
Bureau of Navigation
Shipping Service

SHIPPING ARTICLES.

Notice is hereby given that Section 4519 of the U. S. Revised Statutes makes it obligatory on the part of the master of a merchant vessel of the United States, at the commencement of every voyage or engagement, to cause a legible copy of the agreement (omitting signatures) to be placed or posted up in such part of the vessel as to be accessible to the crew, under a penalty not exceeding One Hundred Dollars.

EUGENE T. CHAMBERLAIN,
Commissioner of Navigation.

ADVANCE WAGES AND ALLOTMENTS.

Sec. 10 (a) That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person,

for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$25 nor more than \$100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment, as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than \$500.

(b) That it shall be lawful for any seaman to stipulate in his shipping agreement for an allotment of any portion of the wages he may earn to his grandparents, parents, wife, sister, or children.

(c) That no allotment shall be valid unless in writing and signed by and approved by the shipping commissioner. It shall be the duty of said commissioner to examine such allotments and the parties to them and enforce compliance with the law. All stipulations for the allotment of any part of the

wages of a seaman during his absence which are made at the commencement of the voyage shall be inserted in the agreement and shall state the amounts and times of the payments to be made and the persons to whom the payments are to be made.

(d) That no allotment except as provided for in this section shall be lawful. Any person who shall falsely claim to be such relation, as above described, of a seaman under this section shall for every such offense be punished by a fine not exceeding \$500 or imprisonment not exceeding six months, at the discretion of the court.

(e) That this section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation.

The master, owner, consignee, or agent of any vessel of the United States, or of any foreign vessel seeking clearance from a port of the United States, shall present his shipping articles at the office of clearance, and no clearance shall be granted any such vessel unless the provisions of this section have been complied with.—Act of June 26, 1884, as amended by the acts of June 19, 1886; December 21, 1898; April 26, 1904; June 28, 1906, sec. 4, and March 4, 1915.

VESSELS OF UNITED STATES MUST HAVE
SLOP-CHESTS, ETC.

Sec. 11. That every vessel mentioned in section forty-five hundred and sixty-nine of the Revised Statutes shall also be provided with a slop-chest, which shall contain a complement of clothing for the intended voyage for each seaman employed, including boots or shoes, hats or caps, under clothing and outer clothing, oil clothing, and everything necessary for the wear of a seaman; also a full supply of tobacco and blankets. Any of the contents of the slop-chest shall be sold, from time to time, to any or every seaman applying therefor, for his own use, at a profit not exceeding ten per centum of the reasonable wholesale value of the same at the port at which the voyage commenced. And if any such vessel is not provided, before sailing, as herein required, the owner shall be liable to a penalty of not more than five hundred dollars. The provisions of this section shall not apply to vessels plying between the United States and the Dominion of Canada, Newfoundland, the Bermuda Islands, the Bahama Islands, the West Indies, Mexico, and Central America.—Act June 26, 1884.

Every vessel bound on any foreign voyage exceeding in length fourteen days shall also be provided with at least one suit of woolen clothing for each seaman, and every vessel in the foreign or domestic trade shall provide a safe and warm room for the use of seamen in cold weather. Failure to make such provision shall subject the owner or master to a penalty of not less than one hundred dollars.—

Sec. 4572, R. S., as amended by the act of December 21, 1898.

Vessels engaged in the whaling or fishing business are not covered by the above provisions of law, or by the regulations below regarding scale of provisions.

CORPORAL PUNISHMENT PROHIBITED.

Flogging and all other forms of corporal punishment are hereby prohibited on board of any vessel, and no form of corporal punishment on board of any vessel shall be deemed justifiable, and any master or other officer thereof who shall violate the aforesaid provisions of this section, or either thereof, shall be deemed guilty of a misdemeanor, punishable by imprisonment for not less than three months nor more than two years. Whenever any officer other than the master of such vessel shall violate any provision of this section, it shall be the duty of such master to surrender such officer to the proper authorities as soon as practicable, provided he has actual knowledge of the misdemeanor, or complaint thereof is made within three days after reaching port. Any failure on the part of such master to use due diligence to comply herewith, which failure shall result in the escape of such officer, shall render the master or vessel or the owner of the vessel liable in damages for such flogging or corporal punishment to the person illegally punished by such officer.

ARTICLES OF AGREEMENT BETWEEN
MASTER AND SEAMEN IN THE MER-
CHANT SERVICE OF THE UNITED
STATES.

Required by Act of Congress, Title LIII, Revised
Statutes of the United States.

Office of the U. S. Shipping Commissioner for the
Port of Baltimore, Md., Jan. 21st, 1921.

IT IS AGREED between the Master and seamen,
or mariners, of the steamship Benowa, of which
W. C. W. RENNY is at present Master or
whoever shall go for Master, now bound from
the Port of (1) Baltimore, Md., to via One
or more Coastwise ports to one or more ports on
West Coast of United States ~~to San Francisco,~~
~~and such other ports and places in any part of~~
~~the world as the Master may direct,~~ and back to
a final port of discharge in the West Coast, United
States, for a term of time not exceeding "3"
calendar months. (2)

GOING ON SHORE IN FOREIGN PORTS IS
PROHIBITED EXCEPT BY PERMISSION
OF THE MASTER.

No Dangerous Weapons (3) or Grog Allowed, and
None to be Brought on Board by the Crew.

SCALE OF PROVISIONS to be allowed and served out to the Crew during the voyage in addition to the daily issue of lime and lemon juice and sugar, or other antiscorbutics in any case required by law.

	Sunday.	Monday.	Tuesday.	Wednesday.	Thursday.	Friday.	Saturday.
Water	quarts.. 5	5	5	5	5	5	5
Biscuit	pound.. ½	½	½	½	½	½	½
Beef, salt	pounds..		1¼		1¼		1¼
Pork, salt	pound..	1		1		1	
Flour	pound.. ½		½		½		
Canned meat	pound.. 1			1			
Fresh bread	pounds.. 1½	1½	1½	1½	1½	1½	1½
Fish, dry, preserved, or fresh.	pound..					1	
Potatoes or yams.....	pound.. 1	1	1	1	1	1	1
Canned tomatoes	pound.. ½					½	
Pease	pint..		⅓			⅓	
Beans	pint..	⅓		⅓			
Rice	pint..	⅓					⅓
Coffee (green berry).....	ounce.. ¾	¾	¾	¾	¾	¾	¾
Tea	ounce.. ⅛	⅛	⅛	⅛	⅛	⅛	⅛
Sugar	ounces.. 3	3	3	3	3	3	3
Molasses	pint.. ½		½		½		
Dried fruit	ounces.. 3		3		3		
Pickles	pint..	¼		¼		¼	
Vinegar	pint..		½				½
Corn meal	ounces.. 4				4		
Onions	ounces.. 4				4		4
Lard	ounce.. 1	1	1	1	1	1	1
Butter	ounce.. 2	2	2	2	2	2	2

Mustard, pepper, and salt sufficient for seasoning.

SUBSTITUTES.

One pound of flour daily may be substituted for the daily ration of biscuit or fresh bread; two ounces of desicated vegetables for one pound of potatoes or yams; six ounces of hominy, oatmeal, or cracked wheat, or two ounces of tapioca, for six ounces of rice; six ounces of canned vegetables for one-half pound of canned tomatoes; one-eighth of an ounce of tea for three-fourths of an ounce of

coffee; three-fourths of an ounce of coffee for one-eighth of an ounce of tea; six ounces of canned fruit for three ounces of dried fruit; one-half ounce of lime juice for the daily ration of vinegar; four ounces of oatmeal or cracked wheat for one-half pint of corn meal; two ounces of pickled onions for four ounces of fresh onions.

When the vessel is in port and it is possible to obtain the same, one-and-one-half pounds of fresh meat shall be substituted for the daily rations of salt and canned meat; one-half pound of green cabbage for one ration of canned tomatoes; one-half pound of fresh fruit for one ration of dried fruit. Fresh fruit and vegetables shall be served while in port if obtainable. The seamen shall have the option of accepting the fare the master may provide, but the right at any time to demand the foregoing scale of provisions.

The foregoing scale of provisions shall be inserted in every article of agreement, and shall not be deducted by any contract, except as above, and a copy of the same shall be posted in a conspicuous place in the galley and in the forecastle of each vessel.

And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said Master, or of any person who shall lawfully succeed him, and of their superior officers, in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service to be duly

performed the said Master hereby agrees to pay to the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the foregoing scale. And it is hereby agreed, that any embezzlement or willful or negligent destruction of any part of the vessel's cargo or store shall be made good to the owner out of the wages of the person guilty of the same. And if any person enters himself as qualified for a duty which he proves himself incompetent to perform, his wages shall be reduced in proportion to his incompetency. And it is also agreed that if any member of the crew considers himself to be aggrieved by any breach of the agreement or otherwise, he shall represent the same to the Master or officer in charge of the ship in a quiet and orderly manner, who shall thereupon take such steps as the case may require.

It is also agreed that (4) No overtime to be paid Crew to sign clear of ship at final port of discharge. If crew is discharged on West Coast, transportation will be paid back to port of Balti., Md.

.....

.....

IN WITNESS WHEREOF, the said parties have subscribed their names on the other side or sides hereof on the days against their respective signatures mentioned.

Signed by W. F. W. Renny, Master, on the 21st day of January, 1921.

These columns to be filled up at the end of the voyage.

Date of Commence- ment of Voyage.	Port at which Voyage Commenced.	Date of Termination of Voyage	Port at which Voyage Terminated.	Date of Delivery of Lists to Shipping Commissioner.
--	---------------------------------------	-------------------------------------	--	---

I hereby declare to the truth of the entries in this Agreement and account of crew, etc.

W. F. W. RENNY,

Master.

The authority of the Owner or Agent for the allotments mentioned within is in my possession.

Shipping Commissioner or Consular Officer.

This is to be signed if such an authority has been produced, and to be scored across in ink if it has not.

1. Here the voyage is to be described, and the places named at which the ship is to touch; or, if that cannot be done, the general nature and probable length of the voyage is to be stated, and the port or country at which the voyage is to terminate.

2. If these words are not necessary they must be stricken out.

3. Sec. 4608, R. S., prohibits the wearing of sheath-knives on shipboard, and the Master informs the crew of this law.

4. Here any other stipulations may be inserted to which the parties agree, and which are not contrary to law.

N. B.—Forms must not be unstitched. No leaves may be taken out of it, and none added or substituted. Care should be taken at the time of

engagement that a sufficiently large form is used. If more men are engaged during the voyage than the number for whom signatures are provided in this form, an additional form should be obtained and used.

Any Erasure, Interlineation, or Alteration in this Agreement will be void, unless attested by a Shipping Commissioner, Consul-General, Consul, or Consular Agent, to be made with the consent of the persons interested.

Signature of Seaman.	Birthplace.	Height.		Description.			Wages per Month.	Wages per Run.	Amounts of Monthly Allotment or Times of Payment.	Allotment Payable to—
	(After foreign birthplace indicate * to naturalized seamen.)	Age.	Feet.	Inches.	Complexion.	Hair.				
1 R. J. Spencer	Md.	28	6	—	fair	Br.	222.50			
2 C. J. Miller	✓	35	5	7½	Dk.	✓	193.75			
3 R. H. Conneill	✓	22	✓	11	fair	✓	170.00			
4 D. W. Davis	Calif.	22	5	3	Dk.		125.00			
5 T. Harrigan	N. Y.	41	5	8¾	Rdy	Br	95.00		A B	2980
6 B. Johansen	Norway, 1P	25	✓	8	fair	✓	85.00		✓	78589
7 Franklin Adreon, Jr.	Md.	20	✓	9	Med.	✓	85.00		✓	87189
8 Frank Garlock	N. Y.	20	✓	4	fair	✓	85.00		✓	79928
9 Fritz B. Shilling	Sweden, 1P	25	✓	2	Lt.	Bld.	85.00		✓	79434
10 Axel H. Yonsson	✓	1P23	✓	6	fair	Br.	85.00		✓	46679
11 Johannes Lahtiner	Finland 1P	25	6	—	✓	Bld.	85.00		✓	81661

		Deck Dept.									
Time of Service.		Whole Amount Wages.	Wages Due.	Place and Time of Entry.		Time at Which to be on Board	In What Capacity.	Shipping Commissioner's Signature or Initials.	Conduct and Qualifications.	Address of Wife or Next of Kin.	
M.	D.			1921							
				Baltimore, Md.,	Jan. 21/1921	Jany. 21	Mate				
						21	2				
						21	3				
				Norfolk,	Jan. 26	Jan. 21st	Radio.	R. F. J. T. M. G. H.			
						21	Busn.				
LB 26068						21	A B				
						21	"				
LB 84324						21	"				
						21	"				
						21	"				
						21	"	J. T. M. Grant, Deputy, Commissioner.			
						"					

Signature of Seaman.	Birthplace. (After foreign birthplace in- sert * to indicate naturalized seamen.)	Height.		Description.		Wages per Month.	Wages per Run.	Amounts of Monthly Allotment or Times of Payment.	Allotment Payable to—
		Age.	Feet.	Inches.	Com- plexion.	Hair.			
33 Wm. H. Crawford	Texas	27	5	8½	Rdy.	Br.	318.75		
34 J. B. Hughes	S. C.	27	6	1¾	✓	Blk.	222.50		
35 W. S. Austin	Mich.	24	5	8½	Lt.	Br.	193.75		
36 L. Angus Carter	Fla.	22	✓	11½	✓	✓	170.00		
37 N. E. Austin	Mich.	21	✓	9	fair	✓	100.00		
38 W. Owens	Ky.	21	✓	7	Rdy.	✓	95.00		
39 A. Hobson	N. C.	21	✓	4	fair	Lt.	95.00		
40 W. Ward	Ala.	24	✓	5¾	Med.	Br.	95.00		
41 Charles V. Smith	Brooklyn, N. Y.	22	5	7½	Rdy.	Lt.	75.00		

		Engine Dept.							
Time of Service.		Whole Amount Wages.	Wages Due.	Place and Time of Entry.	Time at Which to be on Board	In What Capacity.	Shipping Commissioner's Signature or Initials.	Conduct and Qualifications.	Address of Wife or Next of Kin.
M.	D.								
1921									
Baltimore, Md., Jan'y 21				Jan'y 21	Chief Eng.	J. T. M. Grant, Deputy Commissioner.			
				21	1				
				21	2				
				21	3				
				21	Electrician				
				21	Oiler				
				21	"				
				21	"				
				21	Wiper				

Signature of Seaman.	Birthplace.	Height.			Description.		Wages per Month.	Wages per Run.	Amounts of Monthly Allotment or Times of Payment.	Allotment Payable to—
		Age.	Feet.	Inches.	Complexion.	Hair.				
	(After foreign birthplace insert * to indicate naturalized seamen.)									
65 Harry D. Wright	Pensacola, Fla.	28	5	4	Colored	Blk.	135.00			
66 Robert Daigh	Maine	38	5	6½	D. K.	D. K.	115.00			
67 John Lopez	Porto Rico	20	5	6	D. K.	D. K.	100.00			
68 John P. Vargas	Porto Rico Am.	21	5	5	D. K.	Blk.	70.00			
Discharged before U. S. Shipping Commissioner at Norfolk, Va.										
69 John Norgado	Hawaii Am.	19	✓	2	✓	✓	70.00			
Discharged before U. S. Shipping Commissioner at Norfolk, Va.										
70 Steven J. Ryan	Mass.	20	✓	7	Rdy.	Br.	70.00			
71 William Ovid	Kingston St. V.	25	5	8	Colored	Bk.	70.00			
72 C. Garfield	St. Domingo	19	5	6	Colored	Bk.	70.00			

Steward Dept.

Time of Service.		Whole Amount Wages.	Wages Due.	Place and Time of Entry.	Time at Which to be on Board	In What Capacity.	Shipping Commissioner's Signature or Initials.	Conduct and Qualifications.	Address of Wife or Next of Kin.
M.	D.								
1921.									
				Baltimore, Md. Jan. 21/21	Jany.	Stewd.	J. T. M. G.		
						Cook			
						2nd Cook			
					21	M. M.			
					21	M. M.			
					21	M. M.			
					26	M. M.			
					26	M. M.			

CERTIFICATE AS TO SHIPMENT OF SEAMEN

DEPARTMENT OF COMMERCE

Bureau of Navigation

Shipping Service

State of _____,

Port of Baltimore, Md.

On this 21st day of January, personally appeared before me, a Shipping Commissioner in and for the said port, Baltimore, Md., Master W. C. W. Renny, and the following-named seamen:

1. R. J. Spencer.....	26.	51.	76.
2.	27.	52.	77.
3.	28.	53.	78.
4.	29.	54.	79.
5.	30.	55.	80.
6.	31.	56.	81.
7.	32.	57.	82.
8.	33.	58.	83.
9.	34.	59.	84.
10.	35.	60.	85.
11.	36.	61.	86.
12.	37.	62.	87.
13.	38.	63.	88.
14.	39.	64.	89.
15.	40.	65.	90.
16.	41.	66.	91.
17.	42.	67.	92.
18.	43.	68.	93.
19.	44.	69.	94.
20.	45.	70.	95.
21.	46.	71.	96.
22.	47.	72.	97.
23.	48.	73.	98.
24.	49.	74.	99.
25.	50.	75.	100.

And such other names that appear opposite my signature or initials. J. T. M. G.

Severally known to me to be the same persons who executed the instruments attached (shipping articles), who, each for himself, acknowledged to me that he had read or had heard read the same; that he was by me made acquainted with the conditions thereof, and understood the same; and that, while sober, and not in a state of intoxication, he signed it freely and voluntarily, for the uses and purposes therein mentioned.

[Seal]

J. T. M. GRANT,

Deputy U. S. Shipping Commissioner.

CERTIFICATE AS TO SHIPMENT OF SEAMEN

DEPARTMENT OF COMMERCE

Bureau of Navigation

Shipping Service

State of _____.

Port of Norfolk, Va.

On this 26th day of January, 1921, personally appeared before me, a Shipping Commissioner in and for the said port, W. C. W. Renny Master S/S Benowa, and the following named seamen:

1. D. W. Davis.....	26.	51.	76.
2.	27.	52.	77.
3.	28.	53.	78.
4.	29.	54.	79.
5.	30.	55.	80.
6.	31.	56.	81.
7.	32.	57.	82.
8.	33.	58.	83.
9.	34.	59.	84.
10.	35.	60.	85.
11.	36.	61.	86.
12.	37.	62.	87.
13.	38.	63.	88.
14.	39.	64.	89.
15.	40.	65.	90.
16.	41.	66.	91.
17.	42.	67.	92.
18.	43.	68.	93.
19.	44.	69.	94.
20.	45.	70.	95.
21.	46.	71.	96.
22.	47.	72.	97.
23.	48.	73.	98.
24.	49.	74.	99.
25.	50.	75.	100.

And such others whose names appear opposite my signature or initials.

Severally known to me to be the same persons who executed the instruments attached (shipping articles), who, each for himself, acknowledged to me that he had read or had heard read the same; that he was by me made acquainted with the conditions thereof, and understood the same; and that, while sober, and not in a state of intoxication, he signed it freely and voluntarily, for the

[Seal]

uses and purposes therein mentioned.

R. L. HAPPER,

Deputy U. S. Shipping Commissioner.

Cat. No. 1435

CERTIFICATE TO SHIPPING ARTICLES

[Art. 153, Customs Regulations of 1915]

DEPARTMENT OF COMMERCE

Bureau of Navigation

Office of Collector of Customs

No. 14 (Virginia)

Port of—

Norfolk & Newport News

Norfolk Office.

Jan. 26, 1921.

I hereby certify that these Shipping Articles are a true copy of the original this day produced to me in conformity with the provisions of Article 153 of Customs Regulations of 1915.

Given under my hand and seal of office this —— day of January 26, 1921.

[Seal]

W. R. LACY,
Collector of Customs.

Libelant's Exhibit "D."

[Endorsed]: No. 3749. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 9, 1921. F. D. Monckton, Clerk.

U. S. Commissioner, Northern
District of California at S. F.

In Reply, Please Refer
To No 52716

**NAVY DISBURSING OFFICE
NAVY DEPARTMENT
Washington**

29 March 1921

Mr. Ira S. Lillick

909 Kohl Building

San Francisco, California.

SUBJECT: Payment under contract #52716.

Reference: Your letter 16 March 1921 to the Com-
mandant 12th Naval District.

Sir:

You are advised that freight due on cargo of coal carried by Motorship BENOWA has been paid to Houlder, Weir & Boyd Inc.

In view of the fact that a libel has been filed against the vessel by the crew, which should afford sufficient protection for unpaid wages, etc., and of the further fact that under the terms of the contract there was no authority for withholding payments for freight, the action requested in your letter could not be taken.

Respectfully,

C. G. MAYO,

C. G. M.,

Officer-in-Charge.

TELEGRAM
(NIGHT LETTER)

1921 March 31

Edwin H Duff

1308 F St

Washington D C

Am informed though Benowa freight has been paid
by Navy Disbursing Office My telegraphic order to
you under date Seventeenth March has not been com-
plied with Stop Unbelievable that you collected
money and have not transferred it according to order
Will you please wire me collect full explanation what
has occurred

IRA S. LILLICK,
Kohl Bldg,
San Francisco

(Charge: Ira S. Lillick,
909 Kohl Bldg.,
San Francisco.)

51

[WESTERN UNION TELEGRAM.]

C70DA 73 Collect

1921 Apr 1 AM 6 49

Washington D C 924A 1

C008

Ira S Lillick

Care W L Comyn and Co

310 California St

San Francisco Calif

Houlder Weir Boyd were principals on Benowa
contract and when Pacific Steam Navigation asserted

claim rather than have them enjoin me distributing funds as they planned to do principals agreed cancel my authority to collect They have been in wire communication with Comyn and believed you knew all this Money has just been paid principals I have no connection with subject and your orders could not displace those of principals on contract

E. H. DUFF.

[WESTERN UNION TELEGRAM.]
(NIGHT LETTER)

1921 March 31

Navy Disbursing Office
Bureau of Supplies & Accounts
Navy Department
Washington D C
Not Sent

Am informed collection has been made of freight due under your reference bureau S & A Requisition number sixty three dated nineteen January nineteen twenty one notwithstanding my notice telegraphed you sixteenth March Stop On seventeenth March I telegraphed an order to Edwin H Duff Washington authorizing him make collection of portion of amount and to forward same here to my credit as trustee for bank Stop Cannot Believe Duff has made this collection and in view my stop order cannot understand how anyone could make collection please wire my expense who has made collection from

you under what authority and why department has disregarded my Stop order

IRA S LILLICK

Kohl Bldg

San Francisco

(Charge: Ira S. Lillick,
909 Kohl Bldg.,
San Francisco.)

114

[TELEGRAM.]

April 1, 1921.

COLLECT.

Ira S. Lillick,
c/o W. L. Comyn & Co.,
310 California St.,
San Francisco, Cal.

Houlder Weir Boyd were principals on Benowa contract and when Pacific Steam Navigation asserted claim rather than have them enjoin me distributing funds as they planned to do principals agreed cancel my authority to collect. They have been in wire communication with Comyn and believed you knew all this. Money has just been paid principals. I have no connection with subject and your orders could not displace those of principals on contract.

E. H. DUFF.

COPY.

San Francisco, April 1, 1921.

To the Members of the Crew, Motorship "Benowa."

This is to advise you that the M/S "Benowa" is

now in the hands of a Receiver appointed by the United States District Court, and that your services are not required, and that you are to leave the Ship at once.

As a matter of Friendly advice and in your interest, I suggest that you seek other employment immediately, pending such arrangements as may hereafter be made in the matter of said receivership looking to the payment of the amounts already due you.

Yours truly,

(Signed) DREW CHIDESTER.

Receiver for Pacific Motorship Company.

DC/1.

FILE: SPENCER v. "BENOWA."

The following correspondence was sent W. L. Comyn to be read over and returned.

March 16. Letter to A. F. Halstead, Commandant.

March 16. Night letter to Navy Disbursing Officer.

March 17. Night letter to Edwin H. Duff.

March 17. Night letter to Edwin H. Duff, from
Pac M/S Co.

March 19. Letter from A. F. Halstead.

March 29 Letter from C. G. Mayo of Washington.

April 1. Telegram from Duff to Lillick.

April 1. Letter from Comyn to Lillick enclosing
copies of telegrams from Comyn to
Duff and Duff to Comyn.

April 2. Letter to Secretary of Navy Denby.

- April 2. Letter to Duff.
April 4. Letter from Comyn.
April 5. Day letter to Mayo.
April 6. Letter to Sec'y Navy Denby.

Checked 4/10/21.—D B

April fifth, 1921.

W. Leslie Comyn, Esq.,
310 California St.,
San Francisco, Calif.

IN RE: MOTORSHIP "BENOWA."

My dear Mr. Comyn:

Permit me to thank you for sending me your file in this matter, which I have been glad to read, and which I am returning you herewith.

I am in turn sending on to you my own office file, insofar as it concerns the question of this money from the Navy Disbursing Office, and I should like you to return it to me after you have read it.

Yours sincerely,

ISL:B.

Encls.

COPY OF FILE SUBMITTED BY W. LESLIE
COMYN.

(1) Copy of telegram to Duff from me, March 17th.

(2) Telegram to Duff by Pacific Motorship Company, March 17.

"San Francisco, Cal., March 17th, 1921.

Edwin H. Duff,

1308 F Street, N W.

Washington, D. C.

Lillick is wiring Navy Department through you

withdrawing protest on agreement upon your part to collect freight and remit by telegraph to Anglo and London Paris National Bank here twelve thousand dollars to credit Lillick as Trustee for payment BENOWA crew Stop From balance please remit Houlder Weir and Boyd New York one thousand fifty four dollars seventy nine cents commissions due them on BENOWA and remainder by telegraph to Anglo and London Paris National Bank here to credit W. L. Comyn and Co. Inc.

PACIFIC MOTORSHIP COMPANY."

(3) Telegram from Duff to Pacific Motorship Co., dated March 18, 1921.

"1921 Mar. 18, A. M. 11 08

PACIFIC MOTORSHIP CO.

310 California St.

San Francisco Calif.

Benowa Your wire received also wire from Lillick Bureau has taken subject up direct with Houlder Weir and Boyd and as they signed contract will not deal with me in connection with settlement I know none of the intervening circumstances nor whether there is any dispute between you Understand Houlder Wier and Boyd are communicating with you Please advise Lillick of situation and will not therefore answer his wire.

E. H. DUFF."

(4) Telegram from Duff to Pacific Motorship Co., dated March 18, 1921.

"1921 Mar. 18 P. M. 1 16.

Pacific Motorship Co.

310 California St.

San Francisco Calif.

Benowa Houlder Weir and Boyd have just wired me are sending authority to make collection freight money and dispose of same as directed by you.

E. H. DUFF."

(5) Telegram from Duff to Pacific Motorship Co., dated March 22d, 1921.

"1921 Mar. 22, A. M. 11 11.

Pacific Motorship Co.

310 California St.

San Francisco Calif.

Houlder Weir Boyd telephoned me Sanderson and Sons New York claiming advances to Master and canal tolls of about forty seven hundred dollars and I understand are contemplating enjoining Navy Department in paying money to me Stop What is there about this and can arrangements be made to settle with them Stop You understand my authority to collect the funds is from Houlder Weir Boyd and I therefore must not make any distribution that would involve them as principals on the contract.

E. H. DUFF."

(6) From Pacific Motorship Co. to Duff, telegram dated March 22nd.

"San Francisco, Cal., March 22nd, 1921.

E. H. Duff,

1308 'F' Street, NW.

Washington, D. C.

Have received no disbursement account or vouchers covering same from Sandersons on Benowa. However presume Sandersons able substantiate their claim to Houlder Weir & Boyd are telegraphing Houlder that you will remit them in addition to commission named our telegram March fifteenth additional five thousand dollars with which to settle with Sandersons on production disbursement account you remitting balance per our telegram seventeenth to Comyn.

PACIFIC MOTORSHIP COMPANY."

(7) Telegram from Duff to W. L. Comyn Co.,
April 1, 1921:

"1921 Apr. 1 AM 9 39

W L Comyn and Co.

310 California St

San Francisco Calif.

I received a wire from Ira S. Lillick this morning in terms which did not altogether please me concerning the Venowa and have wired him that payment has been made to Houlder Weir Boyd because of notice having been given me of intention enjoin me from distributing funds by Pacific Steam Navigation Lillidk should understand he was not recognized by Navy Department and that only one who could give orders was principal who happened to be Houlder Weir Boyd and it was thought best by reason latter being in touch with you and per-

sons who were asserting claim being in New York to have payment made there rather than take risk of court proceedings in Washington and bringing all parties concerned here I understood from Houlder Weir Boyd they were in telegraphic communication with you and thought of course Lillick was being advised otherwise would have wired him.

E. H. DUFF."

(8) Telegram from W. L. Comyn & Co. to Duff, dated April 1st:

"San Francisco, Cal., April 1st, 1921.

Edwin H. Duff

1308 'F' Street NW

Washington, D. C.

Thanks telegram but our understanding was you were to collect freight and disburse in accordance our advices to you Collection by Houlders was never contemplated by us or Lillick.

W. L. COMYN & CO., INC."

(9) Telegram from Duff to Comyn, dated April 1st, 1921:

"1921 Apr 1 PM 6 58

W. L. Comyn and Co.

310 California St.

San Francisco Calif.

I am sorry you do not seem to appreciate the fact that Houlder was recognized as the principal by the Navy and was the one to whom payment had to be made There was *no any* of interceding except by their assent hence when Navy was asked by Pacific Steam Navigation to advise the moment the check was to be delivered to me so they could enjoin me

from making use of funds Houlder naturally was concerned about his own interests and in view of his having matter up with you by telegraph it was considered no advantage gained by me getting check and would complicate matters if had to bring interest here to engage in legal proceedings As Houlder was the legal owner of the check there was no way either you or Lillick could control against their wish.

E. H. DUFF."

(10) Letter of W. L. Comyn & Co. to E. H. Duff, dated April 4th:

"April 4th, 1921.

E. H. Duff, Esq.,

No. 1308 'F' Street, N. W.,

Washington, D. C.

Dear Sir:

This will acknowledge receipt of your telegram of April 1st, and while we fully appreciate the principals recognized by the Navy were Houlder, Weir & Boyd, if you will refer to your telegram of March 18th you will see therein that you told us Houlder, Weir & Boyd had wired you that they were sending you authority to make collection of the freight money and dispose of same as the Pacific Motorship Company had directed. You further wired the Pacific Motorship Company on the 22nd of March that they must understand the authority to collect the funds was from Houlder, Weir & Boyd, and therefore you could not make any distribution that would involve them as principals on the contract.

In reply, the Pacific Motorship Company wired you further outlining distribution to be made by you, which covered an additional \$5,000.00 to be made to Houlder, Weir & Boyd, and we think the Pacific Motorship Company, Lillick and ourselves were not incorrect in presuming that you would collect the funds and disburse them in accordance with the advices given you.

For your information would say that the moment the funds were remitted to Houlder, Weir & Boyd, they were attached by Sanderson & Sons, New York, preventing the payment to any of the parties involved of their rightful claims.

Yours very truly,
W. L. COMYN & CO., INC.,
President."

WLC/H.

April fifth, 1921.

To the Honorable Edwin H. Denby,
The Secretary of the Navy,
Washington, D. C.

Dear Sir:

Supplementing my letter to you under date of the second instant, I have but just received a letter from Mr. C. G. Mayo, Officer-in-charge of the Navy Disbursing Office, dated March 29, 1921, in the following language:

"SUBJECT: Payment under contract #52716.

Reference: Your letter 16 March, 1921, to the Com-mandant 12th, Naval District.

Sir: You are advised that freight due on cargo

of coal carried by Motorship Benowa has been paid to Houlder, Weir & Boyd, Inc.

In view of the fact that a libel has been filed against the vessel by the crew, which should afford sufficient protection for unpaid wages, etc., and of the further fact that under the terms of the contract there was no authority for withholding payments for freight, the action requested in your letter could not be taken."

To this I have replied as follows:

"Your wire re payment under contract fifty-two seven sixteen received Libel filed against vessel by Edwin H. Denby. #2. April 5th, 1921. crew has not afforded protection. Pacific Motorship Company in hands of receiver and we understood all concerned knew Houlder, Weir & Boyd were acting as agents only for owners of Benowa."

My reply is based upon the fact that a receiver for the Pacific Motorship Company was appointed and qualified upon March 29th last, and, although the libel had been filed against the vessel upon the 7th of March, the court in which the proceeding was pending continued the proclamation in the crew's case from time to time because of the pending proceedings for the receivership, and the proclamation was made only for the first time upon Saturday last, the 2nd instant, and then, at the request of the receiver, his motion to obtain time to plead to the libel was continued until yesterday, the 4th instant, and on yesterday morning the receiver was granted ten (10) days' time within which

to plead. The receiver has stated that he intends to take such action as may be necessary to have the Court pass upon whether the crews of the various vessels belonging to the Pacific Motorship Company shall be paid on the same basis as the creditors of the Company, and the crew of this vessel are, at the present moment, although still on the vessel by sufferance, they have been formally notified by the Pacific Motorship Company to seek other employment, without means of subsistence except through such efforts as I have thus far been able to make in securing them credit, and although having left Baltimore under Shipping Articles which provided that upon discharge at a Pacific Coast port, they should receive their transportation home, are in a situation where, within the next week or ten days, apparently nothing can be done for them until the final conclusion of the admiralty proceedings against the vessel, which may end, no one now can tell when. The result of this will be that they will be "on the street" and with conditions here as they are, will have very little chance of employment,

Edwin H. Denby. #3. April 5th, 1921.

and this, notwithstanding the fact that it has always been a principle enforcible in any court of admiralty jurisdiction that a crew has a lien upon not only the vessel, but freight for cargo carried by that vessel.

I am supplementing my letter to you of the other day with this additional information, so that I may

not be deemed not to have put before you all the information at my command.

Yours very truly,

ISL:B.

[TELEGRAM.]
(DAY LETTER)

1921, April 5.

C. G. Mayo

Officer in Charge

Navy Disbursing Office

Navy Department

Washington D C

Your wire re payment under contract fifty-two seven sixteen received Libel filed against vessel by crew has not afforded protection Pacific Motorship Company in hands of receiver and we understood all concerned knew Houlder Weir & Boyd were acting as agents only for owners of Benowa.

IRA S. LILLICK.

(Charge: Ira S. Lillick,
909 Kohl Bldg.,
San Francisco.)

[Letter-head of W. L. Comyn & Co., Inc.]

April 4th, 1921.

Ira S. Lillick, Esq.,

Attorney At Law,

Kohl Building,

San Francisco, Cal.

My dear Mr. Lillick:

I am enclosing you all of the file in connection with

the "Benowa" matter, which I would be glad if you would return to me after perusal.

Yours very truly,

W. LESLIE COMYN.

WLC/H.

Encl.

April second, 1921.

Edwin H. Duff, Esq.,

1308 F St.,

Washington, D. C.

Dear Mr. Duff:

Your wire to me has been received, in which you inform me that when the Pacific Steam Navigation Company asserted its claim, that rather than have them enjoin you from disbursing funds, as was planned, your principals agreed to cancel your authority to collect. Mr. Comyn had not informed me as to the wires received by him from Houlder, Weir & Boyd, Inc., so that, when I heard, as I did the other evening, that the money had been paid over, it was a complete surprise to me. This is the first time I have ever known the Navy Department to pay over money when such a "Stop Order" as that I wired on to them has been put in.

In any event, I thank you for having so promptly answered my wire.

Your very truly,

ISL:B.

April second, 1921.

To the Honorable Edwin H. Denby,
The Secretary of the Navy,
Washington, D. C.

Dear Sir:

IN RE: NAVY DISBURSING OFFICE. Bureau
Reference S. and A., Requisition No. 63, dated
19 January, 1921. CONTRACT No. 52716.

The contract above referred to, was concluded upon January 24, 1921, by and between Houlder, Weir & Boyd Inc. of 24 State Street, New York City, and the United States, by the Paymaster General, United States Navy (Chief of Bureau of Supplies and Accounts), acting under the direction of the Secretary of the Navy, for the carriage of about 3500 tons of Navy, standard, coal, from Hampton Roads, Virginia, to the Navy Yard at Puget Sound (Bremer-ton), Washington, by the American motorship "Benowa."

The motorship "BENOWA" put into the port of San Francisco in distress, and at a time when, apparently, her owners had not sufficient money to continue to disburse her. The Navy Department apparently came to the conclusion that it would be to its advantage to have the coal discharged at California City, and orders were given to this effect.

The Captain, on behalf of himself and crew, came to me, stating that he had been informed by his owners that no funds were on hand to make any payments to the crew, and that he had not sufficient stores on board to even provide food for his men. As a result of these representations, although he had

been abandoned by his owners (for whom, by the way, Messrs. Houlder, Weir & Boyd, Inc. were acting as agents, and who had in this charter only the interest

Edwin H. Denby. #2. April 2nd, 1921.
that came to them from a percentage of the freight as a commission), I telegraphed to the Navy Disbursing Office upon March 16th, 1921, as follows:

“Navy Disbursing Office,
Bureau of Supplies & Accounts,
Navy Department,
Washington, D. C.

Motorship BENOWA putting into this port in distress has about discharged her cargo under your Reference Bureau S and A Requisition Number sixty three dated nineteen January nineteen twenty one Stop Owners of motorship have apparently abandoned her Stop Crews wages unpaid and they are without means of support You are hereby notified to withhold from the payment to Houlder Weir & Boyd Inc of twenty four State Street New York freight otherwise due them under contract number five two seven sixteen amount due crew viz ten thousand three hundred ninety five dollars eighty three cents plus amount due captain for his wages and advances made sixteen hundred ninety eight dollars forty eight cents

(Signed) IRA S. LILLICK.”

To make sure that the proper notice should be received by the Navy, I addressed the following letter to A. F. Halstead, Commandant, Twelfth Naval District, here:

“Dear Sir:

You are hereby notified that the owners of the motorship “BENOWA,” which transported from Edwin H. Denby. #3. April 2nd, 1921. the loading piers of the N. & W. R. R. at Lambert Point, Virginia, a cargo shown by the bill of lading issued therefor to consist of 3845-2200/2240ths tons of coal, bound for the Navy Yard at Bremerton, Puget Sound, Washington and which motorship put into this port in distress, and, under orders, is now discharging at California City; have not paid the wages due the members of her crew, and there is today due the said crew \$10,395.83, and the sum of \$1698.48 due the Captain of the said vessel.

I am advised that although a libel has already been filed against the vessel by the crew, there is no process which can be issued by a court that will serve to effect a lien upon any amount due from the Government, but that, this formal notice to you will be sufficient to warrant the withholding from the amount of the freight that would otherwise be due for the carriage of said coal, such amount as will protect the crew of said vessel, and the Captain.

You are therefore, notified to withhold from the payment to be made Houlder, Weir & Boyd, Inc., of #24 State Street, New York City, the amounts due the Captain and crew, as above specified viz.: \$12,094.31; reporting this notice with your report to the Navy Disbursing Office of the quantity of coal discharged and certified to have been received by you at California City, so that the members of the crew of

said vessel, and the Captain, may be properly protected."

Edwin H. Denby. #4. April 2nd, 1921.

As recited in my letter to the Commandant, although a libel had already been filed against the vessel by the crew, there was no process which could be issued by the Court that would serve to effect a lien upon any amount due from the Government.

Within twenty-four hours after the sending of my message to the Navy Disbursing Office, the owners of the motorship here in San Francisco apparently heard that the "Stop Order" has been put in, for I was called upon by them and informed that Messrs. Houlder, Weir & Boyd, Inc., in New York City, had acted for them only as agents, and that the freight for the carriage of this coal belonged to them, and that, if I would wire to their Washington representative, withdrawing the "Stop Order" I had placed against the payment of the freight, it would be released and the crew thus cared for. In consequence, on March 17th, 1921, I sent the following telegram to the gentleman whom the Pacific Motorship Company told me represented them:

"Edwin H. Duff

1308 F Street

Washington

D C

Upon understanding you will out of freight due from Navy Disbursing Office under their Reference Bureau S and A Requisition Number sixty three dated nineteen January nineteen twenty one telegraph to Anglo and London Paris National Bank here

twelve thousand dollars to my credit as trustee for payment BENOWA crew and captain you may present this telegram to you to the navy Disbursing Office as a formal release from me of the telegraphic notice sent by me to that office under date sixteenth March nineteen twenty-one.

(Signed) IRA S. LILLICK."

Edwin H. Denby. #5. April 2nd, 1921.

Resting upon this situation, and feeling that it would result in the protection of the master and crew, I waited for a few days and then inquired from the Pacific Motorship Company as to the situation, and was told that some complication had ensued in Washington, but that they expected the money within a few days. Repeated inquiries brought the same response until Thursday (March 31st) afternoon, when I was told that the money had been paid over by the Navy Disbursing Office to Messrs. Houlder, Weir & Boyd, Inc. I thereupon telegraphed Edwin H. Duff as follows:

"Am informed though BENOWA freight has been paid by Navy Disbursing Office, my telegraphic order to you under date seventeenth March has not been complied with Stop Unbelievable that you collected money and have not transferred it according to order Will you please wire me collect full explanation what has occurred."

To this telegram I have received the following reply, under date of April 1st:

"Houlder Weir Boyd were principals on BENOWA contract and when Pacific Steam Navigation asserted claim rather than have them enjoin me dis-

tributing funds as they planned to do principals agreed cancel my authority to collect They have been in wire communication with Comyn and believed you knew all this money has just been paid principals I have no connection with subject and your orders could not displace those of principals on contract

(Signed) E. H. DUFF."

Edwin H. Denby.

April 2nd, 1921.

#6.

Although apparently this whole matter has been closed, and I am helpless, I am writing on to you in order that through possible influence, of which I know nothing, a hardship of the sort that has been worked upon this particular crew, may not be repeated.

It may well be that a representation was made to the Navy Disbursing Office that the crew could look to the vessel for their payment. It is the rule in every civilized nation that the wages of the crew shall be paid from freight and vessel, and where a vessel is abandoned, the crew have a right to sell the cargo upon the vessel, as well as the vessel, in order to obtain what is due them. Here the cargo belonged to the Government. As I have recited, there was no way by which, through court process, the freight could be attached. In my experience, this is the first time that the Navy Department has ever permitted a thing of this sort to be done. The crew of this vessel are at the present time subsisting upon food that is being furnished to them by a local ship's provision house, under represen-

tations from me personally that the ship provision house will be reimbursed out of funds that will be available hereafter through the lien that the men have upon the vessel, but the men are stranded, and I have personally advanced over \$200 to the captain in small amounts from time to time so that their pressing needs may be taken care of.

I pray your indulgence for this long recital of the situation, but I feel that the communication to you is necessary for, otherwise, there could be no check put upon what has been done in this case, and, as I do not understand it, and have always believed that the Government has sought to protect men in the situation that this crew found itself when so abandoned by its owners, I feel that some sort of an investigation should be made.

Yours respectfully,

ISL:B.

[Letter-head of W. L. Comyn & Co., Inc.]

April 1st, 1921.

Ira S. Lillick, Esq.,

Kohl Building,

San Francisco, Cal.

My dear Mr. Lillick:

I enclose herewith telegram received from Edwin H. Duff, together with copy of telegram I have just despatched.

Very truly yours,

W. LESLIE COMYN.

WLC/H.

[WESTERN UNION TELEGRAM.]

San Francisco, Cal., April 1st, 1921.

Edwin H. Duff,

1308 "F" Street, N. W.

Washington. D. C.

Thanks telegram but our understanding was you were to collect freight and disburse in accordance our advices to you Collection by Houlders was never contemplated by us or Lillick.

W. L. COMYN & CO., INC.

(Chge. to sender.)

[WESTERN UNION TELEGRAM.]

Washington, D. C., April 1st, 1921.

Collect—Blue

W. L. Comyn & Co.,

310 California Street,

San Francisco, Cal.

I received a wire from Ira S. Lillick this morning in terms which did not altogether please me concerning the Benowa and have wired him that payment has been made to Houlder Weir & Boyd because of notice having been given me of intention enjoin me from distributing funds by Pacific Steam Navigation Lillick should understand he was not recognized by Navy Department and that only one who could give orders was principal who happened to be Houlder Weir Boyd and it was thought best by reason latter being in touch with you and persons who were asserting claim being in New York to have payment made there rather than take risk of court proceedings in Washington and bringing all parties concerned here I understood from Houlder

Weir Boyd they were in telegraphic communication with you and though of course Lillick was being advised otherwise would have wired him.

E. H. DUFF.

April 7th, 1921.

Edwin H. Duff, Esq.,

1308 F St., N. W.,

Washington, D. C.

IN RE: MOTORSHIP "BENOWA."

Dear Sir:

Through the courtesy of Mr. W. Leslie Comyn your letter to him, under date of the 2nd instant, has been handed me for perusal, and the postscript attached thereto, that my wire to you was not exactly what the situation called for, particularly when I was not personally acquainted with you, and stating that if I doubted your integrity I could have satisfied myself by inquiry in San Francisco of almost any of the established concerns, leads me to address you personally upon the subject for I would not wish you, after what has occurred, to have any feeling that I questioned your integrity when I wired you as I did.

I had heard nothing whatever about the attitude taken by Messrs. Houlder, Weir & Boyd, Inc., and as I knew nothing of Mr. Sewell's call upon you in Washington, nor the claims made by the Pacific Steam Navigation Company, and as I had been given the strongest assurances from the office of the Pacific Motorship Company that the telegraphic order which had been addressed to you would result in the money being paid over, as desired, I could

not understand what had occurred. I knew of you by reputation; I knew that you represented in Washington many of our steamship owners here, and that your reputation was above reproach. My wire to you was dictated by a desire to be informed immediately as to what the situation was, for from what has occurred, I really believe I was not given all of the information at hand in the office of the Pacific Motorship Company: probably because each of those in charge there thought another had informed me about what was going on; but the vessel had been under attachment since the 7th of March, 1921, and each day had meant additional assurances that the money certainly would be paid "tomorrow."

Edwin H. Duff.

#2. April seventh, 1921.

In any event, I hope that you will pardon any seeming discourtesy to you either in my telegram or otherwise, for the position here was so critical with the receiver about to be appointed, that I wished to cover every possible feature of the case to insure the protection of the crew.

I have sent a long report to Secretary of the Navy Denby, covering the exchange of correspondence, telegrams and letters, and have sent my office copy of this long communication to the Secretary of the Navy to Mr. Comyn, in order that he might know exactly what I have done.

My letter to the Secretary was dictated as much through a desire that a similar contretemps might not occur again, if any possible full disclosure of the facts in this case might merit it, for it is the

first time that I have ever heard of a Government Department not endeavoring to protect a rightful claimant in money due from someone to whom it was owed by the Government.

Yours very truly,

ISL:B.

In reply refer
to No. 5774-H-21 GE.

Headquarters
TWELFTH NAVAL DISTRICT
San Francisco, California.

March 19, 1921.

Ira S. Lillick, Atty. at Law,
908-912 Kohl Building,
San Francisco, Calif.

Dear Sir:

Re claim for wages of Captain and crew Motorship
BENOWA.

Receipt is acknowledged of your letter of March 16, 1921, forwarding the above claim. This matter has been referred to the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., by letter this date.

Very truly yours,

A. S. HALSTEAD,
Rear-Admiral, U. S. Navy,
Commandant, Twelfth Naval District.

(Night Letter)

17 March, 1921.

Edwin H. Duff
1308 F Street
Washington
D. C.

87 words.

Upon understanding you will out of freight due from navy disbursing office under their reference bureau S & A requisition number sixty three dated nineteen January nineteen twenty one telegraph to Anglo and London Paris National Bank here twelve thousand dollars to my credit as trustee for payment Benowa crew and captain You may present this telegram to you to the navy disbursing office as a formal release from me of the telegraphic notice sent by me to that office under date sixteenth March nineteen twenty one.

IRA S. LILLICK.

(Charge: Ira S. Lillick,
909 Kohl Bldg.,
San Francisco.)

(Night Letter)

March 17, 1921.

Edwin H. Duff
1308 F Street
Washington
D. C.

Lillick is wiring navy department through you withdrawing protest on agreement upon your part to collect and remit by telegraph to Anglo and London Paris National Bank here twelve thousand dol-

lars to credit Lillick as trustee for payment
Benowa crew Stop From balance please remit
Houlder Weir & Boyd — remainder by telegraph
to Anglo and London Paris National Bank here to
credit of W. L. Comyn & Company, Inc.

PACIFIC MOTORSHIP COMPANY.

(Charge to Sender.)

Post Office Department
Official Business

REGISTERED ARTICLE

No. 23947

INSURED PARCEL

No. _____

Return to I. S. LILLICK,
(Name of Sender)

Street and Number,
or Post Office Box,

208 Kohl Bl
San Francisco,
California.

RETURN RECEIPT.

Received from the Postmaster the Registered or
Insured Article, the original number of which ap-
pears on the face of this Card.

A. S. HALSTEAD

(Signature or name of addressee.)

G. ELSTER

(Signature of addressee's agent.)

Date of delivery 3/17, 1921.

Form 3811

March 16th, 1921.

A. F. Halstead, Commandant,
Twelfth Naval District,
San Francisco, California.

Dear Sir:

You are hereby notified that the owners of the

motorship "BENOWA," which transported from the loading piers of the N. & W. R. R. at Lambert Point, Virginia, a cargo shown by the bill of lading issued therefor to consist of 3845-2200/2240ths tons of coal, bound for the Navy Yard at Bremerton, Puget Sound, Washington, and which motorship put into this port in distress, and, under orders, is now discharging at California City; have not paid the wages due the members of her crew, and there is today due the said crew \$10,395.83, and the sum of \$1698.48 due the Captain of the said vessel.

I am advised that although a libel has already been filed against the vessel by the crew, there is no process which can be issued by a court that will serve to effect a lien upon any amount due from the Government, but that, this formal notice to you will be sufficient to warrant the withholding from the amount of the freight that would otherwise be due for the carriage of said coal, such amount as will protect the crew of said vessel, and the Captain.

You are therefore, notified to withhold from the payment to be made Houlder, Weir & Boyd, Inc., of #24 State Street, New York City, the amounts due the Captain and crew, as above specified, viz.: \$12,094.31; reporting this notice with your report to the Navy Disbursing Office of the quantity of coal discharged and certified to have been received by you at California City, so that the members of the crew of said vessel, and the Captain, may be properly protected.

Yours Respectfully,

ISL:B.

(Night Letter)

16 March, 1921.

Navy Disbursing Office.

Bureau of Supplies and Accounts

Navy Department

Washington, D. C.

Motorship Benowa putting into this port in distress has about discharged her cargo under your reference bureau S & A Requisition number 63 dated nineteen January nineteen twenty one Stop Owners of motorship have apparently abandoned her Stop Crews wages unpaid and they are without means of support You are hereby notified to withhold from the payment to Houlder, Weir & Boyd Inc of twenty four State Street New York freight otherwise due them under contract number five two seven sixteen amount due crew viz. ten thousand three hundred ninety five dollars eighty three cents plus amount due captain for his wages and advances made sixteen hundred ninety eight dollars forty eight cents.

IRA S. LILLICK.

{Charge: Ira S. Lillick,
909 Kohl Bldg.,
San Francisco.)

Draft "Benowa."

N. S. A. 507-A.

(Charter-Party.)

Contract No. 52716

[All correspondence relative to inspections, deliveries, damages, payments, etc., hereon must refer to the above contract number of reference number.]

THIS CONTRACT, of two parts, made and concluded this 24th day of January, A. D. 1921, by and between Houlder, Weir & Boyd, INC., 24 State Street, of New York City, in the State of New York, party of the first part, and the UNITED STATES, by the Paymaster General United States Navy Chief of the Bureau of Supplies and Accounts), acting under the direction of the Secretary of the Navy, party of the second part, WITNESSETH, That, for and in consideration of the payments herein specified, the party of the first part, for themselves and their personal and legal representatives, do hereby covenant and agree to and with the party of the second part, as follows, viz:

1. That they, the said party of the first part, will at their own risk and expense furnish the transportation for the delivery of the cargo or cargoes of coal herein mentioned, at the place and price and within the time herein stated, as per the following specifications, to wit:

SPECIFICATIONS—Continued.

(g) That all expenses of loading of cargo, including port and all other expenses incident thereto, except the expenses for Government inspection of cargo at loading port, shall be borne by the ship, the Government to pay all expenses of discharge; it being understood and hereby agreed that all the ship's tackle, gear, and all other appliances which must be ample in all respects for discharge, together with all attendant expenses including com-

petent winchmen, shall be given at ship's expense to assist in discharging.

(j) That cargo shall be delivered in good condition alongside the wharf or alongside any lighter or vessel where the carrier can safely lie afloat as may be directed by the commandant or officer in charge, as the case may be.

(k) That freight shall be paid on vouchers prepared by the Navy Disbursing Office upon receipt of advice by cable from the commandant or officer in charge, as the case may be, based on the quantity of coal discharged, and only for the quantity of coal certified to have been received; but under no circumstances shall payment be made for any quantity in excess of the bill of lading weight. The contractors, upon completion of loading cargo, shall furnish the Bureau with three copies of bills of lading of the cargo loaded, together with dealers' bills in duplicate containing across the face thereof the following certification: Certified Correct and Just; Payment not Received.

(l) That the contractor shall guarantee to deliver, to the point of destination as designated by the Bureau, the total quantity of coal as per bill of lading weight when loaded, in default of which he will be held responsible for the value of all of said cargo, or any part thereof, at the price per ton paid therefor by the United States at loading port, except as provided in the next succeeding paragraph.

(m) That if, upon discharge of the cargo at destination, the quantity of coal discharged should fall short by one per cent or less from the bill of

lading weight, such shortage may be disregarded by the Government and payment made on the full bill of lading weight. If, however, the shortage exceeds one per cent, the excess shall be paid for by the ship (contractor) at the rate per ton for bunker coal at the point and time of loading, the amount due to be deducted before payment is made for the freight; the Government reserving the right of demanding payment for *any* shortage that may appear, or, of allowing for *all* shortage without deducting its value, if circumstances, within its discretion, appear to so warrant.

(n) That should disaster or any other cause necessitate the vessel putting in at any port and discharging all or any part of cargo, or disposing of it by sale or otherwise, it is hereby agreed that such part of cargo as it may be necessary to dispose of shall be delivered to the United States representative at such port (at the option of the Bureau) to be disposed of by him in such manner as he may be directed by the United States Government. All moneys resulting from such disposal to be received, and all disbursements against cargo to be made by him, the balance, if any remain, to be remitted to the United States Government as he may be directed; the ship to continue or abandon the voyage or to transship cargo, at the option of the Bureau, but under no circumstances shall any payment for pro rata freight be made.

(o) That the Government is exempt from any liability that may be incurred by any vessel serving hereunder for its (Government) failure or that of

its agent or agents to carry out the terms of any charter-party existing between the contractors acting as agent or agents of said vessel and the owners thereof, except in so far as the terms of said charter-party are in harmony with all other terms of this contract.

(p) That under no circumstances shall use be made of the Clayton or any other method of extinguishing fires in cargo, unless it be shown to the satisfaction of the master of the ship that its use is necessitated by the actual presence of fire in the cargo of coal at the time of using same.

(r) That demurrage, general average, and all other claims against the cargo shall be settled by the Auditor for the Navy Department, at Washington, D. C.

Reference: Bureau S. and A. Requisition No. 63 dated 19 January, 1921.

Appropriation: Fuel and Transporation 1921.

Purpose: Charter of vessel for transporation of NAVY coal.

- (a) For the transportation of about 3,500 tons of NAVY Standard Coal from Hampton Roads, Va., to Navy Yard, Puget Sound (Bremerton), Washington, by American Motor Ship BENOWA, at rate of \$6.40 per ton of 2240 pounds. \$22,400.00
- (b) The coal will be supplied by and will be the property of the United States.
- (c) Government despatch will be given this vessel. Laydays will commence at time vessel is

ready to load and so reported by Master, provided it reports within regular working hours at the yard or station on the dates specified in paragraph (d) hereof; cargo to be loaded at the rate of not less than 1500 tons per running day. At the port of discharge laydays on vessel will commence at time vessel is ready to discharge and so reported by Master, provided it reports within regular working hours. In the case of the vessel reporting after working hours, laydays will commence at the beginning of the following day, or if vessel reports prior to the hour on which work commences, laydays will commence at the beginning of the regular working day. Sundays and legal holidays are not to be included in time allowed as laydays in loading and discharging, but any other time lost from any cause, unless such loss of time can be directly attributed to the fault of the vessel, is to be included. When loaded, the vessel will sail immediately for Puget Sound (Bremington), Washington, reporting arrival to the Commandant, Thirteenth Naval District, Navy Yard, Puget Sound, and be subject to his orders in the matter of discharge. The Government agrees to discharge cargo at rate of 500 tons per running day. Demurrage at both loading and discharging ports will be at rate of \$.40 (forty cents) per net registered ton per

day. Canal tolls to be assumed by the NAVY.

- (d) The vessel to serve in this connection will report for loading 24 January, 1921, and should the vessel not be ready to load before 31 January, the NAVY has option of cancelling the charter party. The Master of the BENOWA should report to the Aide for Supply, Fifth Naval District, Naval Operating Base, Hampton Roads, Virginia, for cargo.
- (e) Payment under this contract will be made through the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., and all dealer's bills covering services rendered under this contract, will be forwarded to that address; all such bills to be rendered in duplicate, and the original to bear the following notation, signed by member of your firm: "Certified correct and just; payment not received."

All other conditions of this contract except as modified above will govern.

COVENANTS AND AGREEMENTS—Continued.

2. It is hereby mutually and expressly covenanted and agreed by and between the parties hereto that the article or articles to be furnished or services to be performed under this contract shall conform in all respects to the requirements of the specifications hereunto annexed, which specifications and "Conditions," printed on the proposal of the said party of the first part, shall be deemed and taken as form-

ing a part of this contract with like operation and effect as if the same were incorporated herein; and, in any case where the specifications do not explicitly provide to the contrary, all workmanship, service and materials entering into the performance under this contract shall be of the very best; and said article, articles, or services shall, upon delivery or completion, be subject to inspection and examination by the officer or officers authorized by the said party of the second part to inspect and examine the same; and no article furnished or services performed under this contract shall be accepted until it or they shall have been inspected and approved by such officer or officers.

3. It is further covenanted and agreed that, in case the contractor fails to have any steamer report for loading on or before the canceling date herein specified, the Bureau may, at its option, refuse such steamer or steamers; and, upon due notice to the contractor proceed to obtain such steamer or steamers in accordance with the provisions contained in paragraph four (4) hereof.

4. It is further covenanted and agreed that if the said party of the first part shall fail in any respect to perform the contract the same may, at the option of the United States, be declared null and void, without prejudice to the right of the United States to recover for defaults therein or violations thereof, or the said party of the second part may purchase or procure in such manner and from such person or persons as he deems proper, paying such price therefor as may be necessary in order to procure the

same, such of said articles or materials of the kind specified as near as practicable, or procure the performance of such service, as the said party of the first part shall fail to deliver or perform as required, and may demand and recover from the said party of the first part the difference between the price so paid therefor and the price stipulated in the contract; and the amount of such difference shall be paid by the said party of the first part to the said party of the second part on demand.

5. It is further covenanted and agreed that the said party of the first part shall indemnify the United States, and all persons acting under them, for all liability on account of any patent rights granted by the United States that may be affected by the adoption or use of the articles or service herein contracted for.

6. It is further covenanted and agreed that in carrying out the provisions of the contract no person shall be employed who is undergoing sentence or imprisonment at hard labor which has been imposed by a court of the United States, or of any State, Territory, or municipality having criminal jurisdiction; that the contract is upon the express condition that no Member of or Delegate to Congress nor any person belonging to or employed in the naval service, is, or shall be, admitted to any share or part therein, or to any benefit to arise therefrom except as a member of a corporation; and that any transfer of the contract, or of any interest therein, to any person or party by the said party of the

first part shall annul the same, so far as the United States is concerned.

7. AND THIS CONTRACT FURTHER WITNESSETH, That the United States, party of the second part, in consideration of the foregoing stipulations, do hereby covenant and agree, to and with the party of the first part, as follows, viz:

That upon the presentation of the customary bills, and the proper evidence of the delivery, inspection, and acceptance of the said article, articles, or services and within ten days after such evidence shall have been filed in the Bureau of Supplies and Accounts there shall be paid to the said Houlder, Weir & Boyd, Inc., or to their order, by the Navy Pay Officer at Washington, D. C. (Disbursing Office), the sum of Twenty-two thousand four hundred (\$22,400.00) dollars or the sum found due under this contract; *Provided, however*, That no payments shall be made on any one of said items until all the articles or services embraced in such item shall have been delivered or performed and accepted, except at the option of the party of the second part.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals the day and year first above written.

(See Note.)

Signed and sealed in the presence of—

as to party of the first part.

as to Paymaster General U. S. Navy.

[L. S.]

[L. S.]

[L. S.]

[L. S.]

Paymaster General U. S. Navy,

Chief of the Bureau of Supplies and Accounts.

NOTE.—Contracts and bonds signed by a firm must be duly signed in the firm name and by each member of the firm, each signature to be sealed with wax or wafer seal. Contracts signed by a corporation shall be signed with the corporate name, by an officer thereof, and sealed with the corporate seal; if signed by any other person not an officer, evidence of authority shall be appended. Persons signing contracts as “agent” shall also file evidence of authority to do so.

4—497

BOND.

KNOW ALL MEN BY THESE PRESENTS, That we *Waived* —, as principals, and — and —, as sureties, all of —, are held and firmly bound, etc., unto the Secretary of the Navy in the penal sum of — dollars, to be paid to the Secretary of the Navy, or his successors; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of —, A. D. 19—.

CONDITIONS.

The conditions of the above bond are such, that

if the said above-bounden —, their heirs, executors or assigns, shall well and truly, and in a satisfactory manner fulfill the contract hereto annexed, and deliver the articles or perform the services mentioned in the annexed schedule within the time specified, and to the satisfaction of the said Chief of the Bureau of Supplies and Accounts, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

_____ [Seal]
(Principal signs here.)

_____ [Seal]
_____ [Seal]

(Surety signs here.)
_____ [Seal]

(Surety signs here.)

Signed and sealed in the presence of—

JUSTIFICATION OF THE SURETIES.

(Must be sworn to before a notary public or other officer authorized to administer oaths.)

State of,

County of,—ss.

I, —, one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of — dollars, over and above all my debts and liabilities; that I am not a copartner of the said — and that I have no contract at this time with the Bureau of Supplies and Accounts.

_____, Surety.

Subscribed and sworn to before me this — day
of —, A. D. 19—.

State of ————,
County of ————, —ss.

I, ———, one of the sureties named in the within
bond, do swear that I am pecuniarily worth the sum
of — dollars, over and above all my debts and
liabilities; that I am not a copartner of the said
—— and that I have no contract at this time with
the Bureau of Supplies and Accounts.

—————, Surety.

Subscribed and sworn to before me this — day
of —, A. D. 19—.

CERTIFICATE.

(Must be signed by a United States officer in all
cases where individuals are named as bonds-
men. Unnecessary if corporate surety bond is
furnished.)

I, ———, do hereby certify that — and ———, the
sureties above named, are personally known to me,
and that, to the best of my knowledge and belief,
each is pecuniarily worth, over and above all his
debts and liabilities, the sum stated in the accom-
panying affidavit subscribed by him.

Subject: Spencer vs. "Benowa."

Law Offices of
PILLSBURY, MADISON & SUTRO
Standard Oil Building.

E. S. Pillsbury
Frank D. Madison
Alfred Sutro
Horace D. Pillsbury
Oscar Sutro

Cable Address "EVANS" W. U. T. Code.

San Francisco, May 5, 1921.

Messrs. Gagan & Lehner,
Official Reporters,
Post Office Building,
San Francisco.

Dear Sirs:

In accordance with the understanding arrived at at the time the testimony was taken, I herewith return Libelant's Exhibit "D." I also hand you the papers taken out of Mr. Comyn's file, which it was stipulated might also be considered in evidence.

Yours truly,

FELIX D. SMITH.

Enc.

[WESTERN UNION TELEGRAM.]

2nd March 1921 San Francisco

EDWIN H DUFF

1308 F Street

Washington D C

Have personally seen to despatch check to you tonight Please accept my apology for it not having been previously sent Stop Steamer Benowa owned by Pacific Motorship Company for which Company

we are agents here and who are in financial difficulties just arrived in this port in distress bound for Bremerton Steamer is leaking Tail shaft couplings broken necessitating heavy repair job which owners are in no position to make Would you get in touch with Peoples Navy Department and see if it is not possible obtain permission discharge cargo at Tiburon instead of Bremerton If Tiburon not ready receive cargo owners will hold vessel here any reasonable time until Navy Department ready take

W. LESLIE COMYN.

Chg. W. L. Comyn & Co. Inc.

WLC:D.

[Stamped across face of telegram: Confirmation.]

[WESTERN UNION TELEGRAM.]

358 California St,
Sutter 4321 Local 51,

1921 Mar 3 AM 7 48.

B82DA 43 Collect

Washington DC 1024A 3

C05

W Leslie Comyn

310 Calif St

San Francisco Calif

Benowa Navy wiring commandant Tiburon investigate situation and report if can discharge without serious inconvenience Other vessels due to arrive Stop Navy will do its best to carry out our wishes this respect if facts are borne out by report of commandant.

E. H. DUFF.

EDWIN H. DUFF

Harris & Shafer Company Building

1308 F Street, N. W.

Cable, "Osage"

Telephones Main 7642

Main 9719

Refer to file ———

Washington, D. C. March 3, 1921.

W. Leslie Comyn, Pres.,

W. L. Comyn & Co.,

310 California Street,

San Francisco, Cal.

Dear Sir:—

S/S "BENOWA."

I received your telegram this morning in regard to the above subject and immediately took the case up with the Chief of the Bureau of Supplies and Accounts and wired you that a telegram was being sent to the commandant at San Francisco asking for report on the situation.

The Bureau is very favorably disposed towards us in this matter and if the facts are as represented by me this morning I think authority will be granted to carry out your wishes. Of course, the Navy Department has a number of Shipping Board vessels due at Tiburon and if they grant our request they wish to do it in the light that it will not run them to demurrage on those vessels.

You will doubtless get in touch immediately with the commandant and arrangements will very likely be effected between you there because I think what-

ever the commandant wires to Washington will guide their action.

Yours very truly,
EDWIN H. DUFF.

EHD/EML.

Thanks for your advice regarding check.

[WESTERN UNION TELEGRAM.]

1921 Mar 7 PM 1 46

Wa Washington DC 311P 7

358 California St,
Sutter 4321 Local 57
C344DA 70 Collect blue
C86

W L Comyn and Co
310 Calif St

San Francisco Calif.

Benowa Navy will agree take delivery this cargo Tiburon instead of Bremerton upon understanding no demurrage to accrue and must discharge in such manner as to not cause navy incur demurrage on account any shipping board vessels which may arrive for discharge Stop Probabilities are Benowa will get discharge in good time but by reason this concession we must agree as above Am I authorized to do so Answer.

E. H. DUFF.

[TELEGRAM.]

San Francisco, Cal., March 7th, 1921.

E. H. Duff,

1318 "F" Street,

Washington, D. C.

BENOWA You are authorized agree conditions
specified

PACIFIC MOTORSHIP COMPANY.

(Chge. to Sender.)

EDWIN H. DUFF

Harris & Shafer Company Building

1308 F Street, N. W.

Cable, "Osage"

Telephones Main 7642

Main 9719

Refer to file ———

Washington, D. C., March 8, 1921.

Pacific Motorship Company,

c/o W. L. Comyn & Co.,

310 California Street,

San Francisco, Cal.

Gentlemen:—

S/S "BENOWA."

I beg to acknowledge receipt of your telegram
of this date in which you authorized me to agree
to the conditions specified in my wire of yester-
day relative to the discharge of this vessel at
Tiburon instead of Bremerton.

I have duly notified the Navy Department and

instructions are being sent to the Commandant accordingly.

Yours very truly,

EDWIN H. DUFF,

EHD/EML.

Received Mar. 14, 1921.

HEADQUARTERS

TWELFTH NAVAL DISTRICT

SAN FRANCISCO, CALIFORNIA.

THIS AGREEMENT, entered into this ninth day of March, in the year 1921, by and between PACIFIC MOTORSHIP COMPANY, the Owners of the Motor Ship "BENOWA," at San Francisco, California, party of the first part, and the UNITED STATES, by the Supply Officer (named below), party of the second part, amends the terms and conditions of Contract No. 52716, executed by the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., TO PROVIDE AS FOLLOWS:

WHEREAS, Three thousand eight hundred and forty-five 2200-2240 tons of semi-bituminous coal loaded at Lambert Point, Virginia, and to be discharged at the U. S. Navy Yard, Bremerton, Puget Sound, Washington, is, in accordance with authority obtained from the Navy Department, to be discharged at the U. S. Naval Fuel Depot, California City, California, at such time and when it will be possible for the U. S. Naval Fuel Depot, California City, California, to receive this coal.

Under this agreement no charges for demurrage are to be claimed or allowed, charges for towing of

Motor-ship "BENOWA" to U. S. Naval Fuel Depot, California City, California, and away from the U. S. Naval Fuel Depot, California City, California, and any and all towing while at the U. S. Naval Fuel Depot, California City, California, are to be settled for by the owners of the motor-ship "BENOWA" at San Francisco, California.

That part of the Contract, No. 52716, which provides for a guaranteed daily rate of discharge of coal is hereby canceled and no claim can be allowed.

The adjustment in price for transporting of three thousand eight hundred forty-five and 2200-2240 tons of semi-bituminous coal from Lambert Point, Virginia, to the U. S. Naval Fuel Depot, California City, California, instead of from Lambert Point, Virginia, to the U. S. Navy Yard, Bremerton, Puget Sound, Washington, is to be fixed by arrangement between the owners of the Motor-ship "BENOWA" at San Francisco, California, and the Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

All other conditions of the original Contract No. 52716 to remain as originally specified.

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals on the day and year first above written.

PACIFIC MOTORSHIP COMPANY,

Party of the first part,
President.

(Witness to signature of party of the first part.)

Party of the first part,
Secretary.

(Witness to signature of party of the first part.)

GEO. A. WILCOX,

Lieutenant (SC) U. S. N.

Supply Officer.

JOHN C. POSHEPNY,

(Witness to signature of Supply Officer.)

[WESTERN UNION TELEGRAM.]

358 California St.

Sutter 4321 Local 57

Received Mar. 10, 1921.

E18NY 61 Blue

AX New York NY 1116A 10

087

W L Comyn & Co

310 California St

San Francisco, Calif

Benowa Navy Department advises can accept delivery cargo at Tiburon provided demurrage clause deleted altho steps will be taken to discharge expeditiously as possible Stop It is definitely understood no demurrage will accrue by reason of any delay Other conditions of contract unchanged Stop If you agree communicate promptly naval fuel depot Tiburon advising us result order Sign agreement this effect

HOULDER WEIR & BOYD INC.

San Francisco, Cal., March 10th, 1921.

Houlder Weir & Boyd

21-24 State Street,

New York City

Thanks telegram Confidentially after receipt
your telegram arranged matter through our Wash-
ington correspondent

All necessary agreements from Naval authorities
already signed

W. L. COMYN & CO INC.

(Chge. to Pac. Motorship Co.)

March 14th, 1921.

E. H. Duff, Esq.,

1308 "F" Street, N. W.,

Washington, D. C.

Dear Sir:

We now beg to confirm various telegrams passing
between us relative to Pacific Motorship Co's., M/S.
"BENOWA," for which Company we are Agents,
and wish to thank you for the good efforts extended
on your part.

For your information we enclose herewith agree-
ment entered into on the 9th day of March between
the Pacific Motorship Company and the United States
wherein that Company agreed to certain conditions
required by the Navy with respect to demurrage and
daily rate of discharge. We would call your espe-
cial attention to the last paragraph on first page
relative adjustment in price for transporting this
coal to California City instead of Bremerton, and
would ask that you kindly get in touch with the Au-
thorities at Washington with a view to arranging

that no reduction in the freight rate be made. For your information, the rate at which this coal was moved, is \$6.40 per ton which, in our opinion is a very low rate, even to San Francisco.

Thanking you for your efforts, we are

Yours very truly,

W. L. COMYN & CO., INC.,

By _____.

RHH.

[WESTERN UNION TELEGRAM.]

358 California St.

Sutter 4321 Local 57.

1921 Mar 16 PM 12 51

A245CH 32 Collect

Wa Washington DC 330P 16

C85

Pacific Motorship Co

2310 California St

San Francisco Calif.

Benowa Department must settle from Washington end but will pay on telegraphic report outturn weight Do not understand any intention changing rate by reason of discharging San Francisco instead of Bremerton

E. H. DUFF.

San Francisco, Cal., March 16th, 1921.

Edwin H. Duff,

1308 "F" Street, N. W.

Washington, D. C.

Benowa Are arranging Navy here telegraph Washington outturn weight Friday Please collect freight remitting by telegram to credit W L Comyn

& Co Inc Anglo and London Paris National Bank
San Francisco.

PACIFIC MOTORSHIP COMPANY.

(Chge to Sender.)

30 Words.

[WESTERN UNION TELEGRAM.]

1921 Mar 16 AM 8 09

358 California St.

Sutter 4321 Local 57

23NY 27 Blue

C

AX New York NY 1034A 16

051

W L Comyn & Co

310 California St

San Francisco Calif.

Navy Department now advise it will be necessary
for us sign modified agreement per our telegram
tenth in order secure payment freight authorize ad-
vising if vessel discharged.

HOULDER WEIR & BOYD INC.

RH—Please show to Mr. Comyn and say we are
not answering until we hear from Duff—R J H—
3/16/21.

Received Mar 16 1921.

[TELEGRAM.]

San Francisco, Cal., March 16th, 1.

Houlder, Weir & Boyd, Inc.,

24 State Street,

New York City

BENOWA We signed modified agreement Our

Washington correspondent will collect freight.

PACIFIC MOTORSHIP COMPANY.

(Chge. to Sender.)

EDWIN H. DUFF

Harris & Shafer Company Building

1308 F Street, N. W.

Cable, "Osage"

Telephones Main 7642

Main 9719

Refer to File ———

Washington, D. C., April 2, 1921.

Received Apr 6-1921

Messrs. W. L. Comyn & Co.,

310 California Street,

San Francisco, Cal.

Gentlemen:

S/S "BENOWA."

I confirm the several telegrams which have been exchanged during the last day or two in regard to the payment of the freight on the coal transported to the West Coast for account of the Navy by the above named vessel.

After I had been given authority to lodge with the Navy Department for the latter to pay to me the freight money due on this vessel, Mr. Sewell, of Houlder, Weir & Boyd, stopped in Washington on his way from the south and there were some telegrams here for him from his New York office. In these wires was some mention in regard to the claim of the Pacific Steam Navigation Company and the suggestion was made to him by the Home Office that it might be well to cancel the authority which had

been given me. Mr. Sewell discussed the subject with me and it was agreed at that time it made very little difference to whom the money was paid if injunction proceedings were to be resorted to and for the time being matters were allowed to stand just as they were. After Mr. Sewell returned to New York he talked with me on the telephone and stated he had been in telegraphic communication with your people relative to making some kind of a settlement with the claimants, but intimated to me that while they were pretty close to an arrangement what you had offered to do did not meet with the wishes of the representatives of the Pacific Steam Navigation Company. I did not get the details very clearly on this so that I do not wish to be quoting exactly what he said to me. Maybe I misunderstood his statement, but the general impression I got from his talk was that they were in communication with you and were endeavoring to remove the obstacles which seemed to confront settling the account.

At the time I was talking to Mr. Sewell on the telephone I referred to the complications which might ensue if the injunction proceedings were lodged against me—that I knew absolutely nothing as to the merits of the case or did not know anything of the facts bearing upon the subject. I stated I did not wish to become involved in a controversy where three or four different interests were involved and have a lot of money tied up in by hands for an indefinite period. It was suggested that if they intended to enjoin me they would enjoin anyone from making use of the money—in fact, they have talked

of enjoining the Secretary of the Navy in making settlement at all. Later on the Paymaster General got in touch with me by telephone and stated representatives of the Pacific Steam Navigation Company were following up the check and that their purpose seemed to be to get a restraining order against me as soon as the Navy put the check in the mails. I thereupon got in touch with Houlder, Weir & Boyd and stated the situation and it was agreed then that the best course to pursue would be to allow the check to come direct to them as principals on the contract, and as they were in New York along with the representatives of the claimants, whatever was decided could be handled from that end. I thereupon advised the Navy Department of the decision and the check was finally sent to Messrs. Houlder, Weir & Boyd.

Of course, I understood your request as well as that of Mr. Lillick that I take receipt of the check and make the distribution in accordance with what had been mutually agreed upon, but you understand my getting the check was dependent entirely upon the wishes of Messrs. Houlder, Weir & Boyd. They were the principals and the Navy Department did not know either yourselves or Lillick in the transaction, hence I could do nothing other than follow the wishes of the principals, and I could see no reason why there would be any objection upon your part to this course when you had gone to the extent of allowing Houlder, Weir & Boyd to act as principals on the contract. As a matter of fact it made no difference whether I agreed or disagreed with their plans, they had the full authority to act as they might

desire and I had no standing whatever except so far as they might assent thereto. The mere fact of their having given authority to pay the money to me would not have stopped them at their pleasure of cancelling that authority. Surely Messrs. Houlder, Weir & Boyd must be in telegraphic communication with you concerning this transaction, although they have not reported to me anything concerning the status of the case since the check was sent them by the Navy Department.

I do not see wherein I could have followed any other course than that which I did pursue and regret very much if you do not agree with me.

Yours very truly,

EDWIN H. DUFF.

EHD/EML.

I assume you will explain the matter to Mr. Lillick. I do not have his address or I would write him direct. His wire to me was not exactly what the situation called for, particularly as he was not personally acquainted with me. If he doubted my integrity he could have satisfied himself by inquiry in San Francisco of most any of the established concerns.

EDWIN H. DUFF

Harris & Shafer Company Building

1308 F. Street, N. W.

Cable, "Osage"

Telephones Main 7642

Main 9719

Refer to File——

Washington, D. C., April 11, 1921.

W. L. Comyn & Co., Inc.,
310 California Street,
San Francisco, Calif.

Gentlemen:—

S/S “BENOWA.”

I have your letter of the 4th instant all of which has been carefully noted.

Since writing your letter you have doubtless received my communication giving more of the details as to the reason why I did not collect and make distribution of the funds in accordance with my wires to you. You quite understand that while authority had been lodged with the Navy Department to pay the funds to me, that did not detract from the authority of Messrs. Houlder, Weir & Boyd to change the arrangement so that the funds would be paid to them. They had that right up to the moment the check would be mailed or delivered to me and I was powerless to do other than follow their wishes in the premises.

You understand the Pacific Steam Navigation were prepared to enjoin me from making distribution of the money the moment it got into my possession. The Bureau of Supplies and Accounts had informed me they were camping on my trail and intended to enjoin me the moment the Navy Department advised the check had been mailed to me. Therefore, it seems to me it made little difference as to whether they enjoined me or Messrs. Houlder, Weir & Boyd, except that by lodging the restraining order in New York made it possible for all parties

of interest to be there without traveling to Washington to attend any litigation.

While I know none of the details concerning the claim of the Pacific Steam Navigation Company, I hope that in the very near future if not already that everything will be straightened out to your entire satisfaction.

Yours very truly,
EDWIN H. DUFF.

EHD/EML.

April 13th, 1921.

Edwin H. Duff, Esq.,

No. 1308 "F" Street, N. W.,

Washington, D. C.

My dear Mr. Duff:

This will acknowledge receipt of your valued favor of the 2d of April, contents of which are duly noted. We have passed on your letter to Mr. Lillick for his perusal, and we believe he is writing you directly.

You doubtless now appreciate that Mr. Sewell of Houlder, Weir & Boyd never communicated with us advising **any change** in the understanding that we had relative to your collecting and disbursing the funds in question. Had he done so we could have so arranged matters that the distribution would have been carried out. As it was, the moment the funds were in Houlder, Weir & Boyd's hands, the Pacific Steam Navigation Company attached the total amount.

Yours sincerely,

WLC/H.

Libelant's Exhibit "E."

[Endorsed]: No. 3749. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 9, 1921. F. D. Monckton, Clerk.

U. S. Commissioner
Northern District of
California at S. F.
File 29
File 71

San Francisco, Cal., October 28th, 1920.

W. C. W. Renny, Esq.,
Captain, M/S "Benowa,"
c/o Allen & Friedrichs,
New Orleans, La.

Dear Sir:

Your letter of the 21st of October, with respect to Sulphur and Coal Charter Parties came duly to hand, and in reply thereto please be advised that we have made arrangements with the Coal Charterers to extend the cancellation date to November 30th.

Under the circumstances, I feel assured that you will be able to make this date.

Yours very truly,

PACIFIC MOTORSHIP COMPANY,
R. J. RINGWOOD,

President.

RJR/H.
1213.

Cat. No. 1340.

1917.

THE UNITED STATES OF AMERICA.

DEPARTMENT OF COMMERCE.

Bureau of Navigation.

BILL OF SALE OF REGISTERED VESSEL.

(Secs. 4170, 4171, 4192, 4193, 4194, and 4196, Revised Statutes, and Arts. 53 and 57, Customs Regulations of 1915.)

To All to Whom These Presents Shall Come,
GREETING:

KNOW YE, That* It, the "PACIFIC MOTOR-SHIP COMPANY," corporation organized under the laws of the State of Delaware, and having its principal place of business at San Francisco, State of California, sole owner as appears by Bill of Sale, on record in the Custom House, book 67, RV, page 58, dated May 29th, 1920, of the Gas Screw or vessel called the "BENOWA," of the burden of 2485 tons, or thereabouts, for and in consideration of the sum of Ten (\$10.00) Dollars, lawful money of the United States of America, to it in hand paid, before the sealing and delivery of these presents, by† the "ANGLO-CALIFORNIA TRUST COMPANY" (Trustee), a corporation organized under the laws of the State of California, and having its principal place of business at San Francisco, State aforesaid, the receipt whereof it does hereby acknowledge and is therewith fully satisfied, contented, and paid, have

* Here insert the name and address of each vendor, and the part conveyed by him.

bargained and sold, and by these presents do bargain and sell, unto the said† “ANGLO-CALIFORNIA TRUST COMPANY” (Trustee), its successors and assigns, the whole of the said Gas Screw or vessel, together with all the masts, bowsprit, sails, boats, anchors, cables tackle, furniture, and all other necessities thereunto appertaining and belonging; the latest CERTIFICATE OF REGISTRY of which said Gas Screw or vessel is as follows, viz:

A True Copy of the Latest Certificate of Registry.

THE UNITED STATES OF AMERICA,
DEPARTMENT OF COMMERCE.
BUREAU OF NAVIGATION.

Insert “Permanent” or “Temporary.”

Permanent

Register No. 278.

Official No.	Letters
219,448	LVGM

Measured: Seattle, Wn., 1919. Radio Call: KOTZ.

Rebuilt at, 1 Service: O. Freight.

Remeasured:, 1 Number of Crew, 28.

CERTIFICATE OF REGISTRY.

In pursuance of chapter one, title XLVIII, “Regulation of Commerce and Navigation,” Revised Statutes of the United States, Wilbur E. Dow, of Seattle, Washington, Attorney-in-fact (Pantages Building), having taken and subscribed the oath—required by law, and having sworn — that J. E. Chilberg, of Seattle, Washington, is the only owner— of the vessel called the “Benowa,” of

† Here insert the name and address of each vendee, and the part conveyed to him.

Seattle, whereof W. C. W. Renny is at present master, and is a citizen of the United States, and that the said vessel was built in the year 1919, at Seattle, Washington, of wood, as appears by Certificate of Admeasurement of A. A. Blacker, Acting Admeasurer, vessel formerly documented as the Br. Co. S. "Benowa," now re-nationalized, built by Patterson-McDonald Shipbuilding Co., having certified that the said vessel is a Gas Screw; that she has One deck, Two mast, a Sharp head, and a Round stern; that her register length is 268 ¹/₁₀ feet, her register breadth 48 ⁴/₁₀ feet, her register depth 24 ⁶/₁₀ feet, her height — ₁₀ feet; that she measures as follows:

	Tons.	100ths.
Capacity under tonnage deck.....	2295	93
Capacity between decks above tonnage deck.....		
Capacity of inclosures on the upper deck, viz: Forecastle 36.11; bridge, and poop 588.39; break....; houses —round...., side...., chart...., radio....; excess hatchways 9.82; light and air....;	797	43
Gross Tonnage.....	3093	35

Deductions under Section 4153, Revised Statutes,
as amended:

Crew space, 128; Master's cabin, 13.63;
Steering gear, —; Anchor gear,
15.31; Boatswain's stores, 4.54;
Chart house, 6.57; Donkey engine
and boiler, 56.16; Radio-house,

—; Storage of sails, —; Propelling power (actual space, 218.-86), 383.00;

Total Deductions.....	606	19
Net Tonnage.....	2485	

The following described spaces, and no others, have been omitted, viz: Forepeak—, aftpeak —, open forecastle—, open bridge—, open poop—, open shelter deck—, anchor gear—, steering gear 15.69, donkey engine and boiler—, light and air 42.71, wheelhouse—, galley 12.44, condenser—, water-closets 14.62, cabins—.

and the said Wilbur E. Dow having agreed to the description and admeasurement above specified, according to law, said vessel has been duly registered at this Port.

Given under my hand and seal, at the Port of Seattle, Wash., this 15th day of January, in the year one thousand nine hundred and twenty.

[place for seal of naval officer.]

No.

Naval Officer.

[Place for seal of collector.] CHAS. MILLER,
Deputy Collector of Customs.

[Seal of the Department of Commerce.]

_____,
Commissioner of Navigation.

To have and to hold the said The Whole of the said Gas Screw “Benowa” and appurtenances thereunto belonging unto it, the said “ANGLO-

A. F. H. CALIFORNIA TRUST COMPANY" (Trustee),
N. P. its successors and assigns, to the sole and only proper use, benefit, and behoof of it, the said

A. F. H. "ANGLO-CALIFORNIA TRUST COMPANY"
N. P. (Trustee), its successors and assigns forever: And

A. F. H. it, the said Pacific Motorship Company, has prom-
N. P. ised, covenanted, and agreed, and by these presents does promise, covenant, and agree, for itself, its successors and assigns, to and with the said

A. F. H. "ANGLO-CALIFORNIA TRUST COMPANY"
N. P. (Trustee), itself, its successors and assigns to warrant

A. F. H. and defend the said the whole of the said Gas Screw or
N. P. vessel and all the other before-mentioned appurtenances against all and every person and persons whomsoever.

IN TESTIMONY WHEREOF, It, the said Pacific Motorship Company, has caused its corporate name to be hereunto subscribed by its president, and its corporate seal to be affixed by its secretary, this 21st day of October, in the year of our Lord one thousand nine hundred and twenty.

PACIFIC MOTORSHIP COMPANY. [Seal]

R. J. RINGWOOD, [Seal]

President.

R. H. HOLMBERG, [Seal]

Secretary.

Signed, sealed and delivered in presence of—

C. M. LUTTRELL.

C. M. LUTTRELL.

State of California,

City and County of San Francisco.

On this twenty-first day of October, in the year

One Thousand Nine Hundred and Twenty, before me, Anne F. Hasty, a Notary Public in and for the said city and county, residing therein, duly commissioned and sworn, personally appeared R. J. Ringwood and R. H. Holmberg, known to me to be the President and Secretary, respectively, of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the corporation therein named, and they acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in said City and County of San Francisco, the day and year in this Certificate first above written.

[Seal] ANNE F. HASTY,
Notary Public in and for the City and County of
San Francisco, State of California, 214 California Street.

My commission expires July 20, 1923.

State of ¹—,

County of, —, —ss.

BE IT KNOWN, That on this — day of —, 19—, personally appeared before me, —, and acknowledged the within instrument to be — free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal this — day of —, A. D. 19—.

[Seal]

¹This acknowledgment may be made to conform to requirements of State laws.

²If the vendor is a corporation, write:

—, “who being duly sworn, deposed and said that he is the president, secretary, or other officer or agent [the acknowledgment of an instrument by a corporation must be made by some officer thereof authorized to execute it by the board of directors of the corporation. If the corporation has no seal, that fact must be stated in place of the statement respecting the seal,] of the [name of corporation], the corporation which is described in and executed the within instrument, and that he knows the seal of the said corporation and that it is affixed and was so affixed to the within instrument by order of the board of directors of the said corporation at whose order he signed his name and acknowledged the within instrument to be the free act and deed of the said corporation,” or such other words as may be required by State laws.

Cat. No. 1340. Department of Commerce. Bureau of Navigation. Bill of Sale of Registered Vessel. Pacific Motorship Company to Anglo-California Trust Company (Trustee), The Whole of the Gas Screw called the “Benowa.” Custom-house, —, 19—. Received for record, —h. —m. — M. Recorded, book —, page —. ———, Collector of Customs.

I, Grant Cordrey, Trust Officer of Anglo-California Trust Company, hereby certify that this is a full, true and correct copy of a bill of sale delivered to said Trust Company, October 21st, 1920, and ever

since then in the possession of said Trust Company.

GRANT CORDREY,

Trust Officer.

5-7-21.

[Endorsed]: No. 3749. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 9, 1921. F. D. Monckton, Clerk.

Libelant's Exhibit "F."

U. S. Commissioner Northern
District of California at S. F.

[Letter-head of Pacific Motorship Company.]

San Francisco, March 11th, 1921.

Captain W. C. W. Renny,

Commanding M/S "Benowa,"

Meiggs Wharf—San Francisco.

Dear Sir:

This is to advise you, that we have completed arrangements for the discharging of your coal cargo at the U. S. Navy Coaling Station, California City.

Therefore please unhook your wireless, have your booms ready, hatches uncovered, and all stays and other gear which will effect the swinging of the coal buckets taken down, and vessel ready to discharge at eight o'clock sharp tomorrow morning, March 12th, 1921.

Peterson's Tugboat Company will put two boats alongside your vessel where she now lies in the stream tomorrow morning, March 12th, 1921, at 4 A. M., therefore be ready to take care of all matters

aboard your vessel, so as to avoid any delay to the vessel.

The vessel will berth at California City, at the outer berth Port side to.

Yours very truly,

PACIFIC MOTORSHIP COMPANY,
R. J. RINGWOOD.

[Endorsed]: No. 3749. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug, 9, 1921. F. D. Monckton, Clerk.

M/S BENOWA.

Port of San Francisco.

Mar. 10, 1921.

We, the undersigned officers and members of the crew of the M/S Benowa, do hereby agree to pay from our subsistence money or wages, a *pro rata* share of accounts, for stores supplied by the firm of J. & R. Wilson, Inc., to us, on presentation of accounts by said firm, mentioned above, upon payment to us of above subsistence or wages by our attorney, as will be due us from above-named vessel.

We will authorize Mr. Spencer, 1st mate, and Mr. Crawford, chief engr., to check all accounts for us, tho in case of necessity, accounts will be open for inspection by members of the crew.

Richard J. Spencer, 1st off.

C. J. Miller, 2nd off.

Robt. F. Council, 3rd off.

Tim Harrigan, Bos'n.

Franklin Adrean, Jr., A. B.

Frank Garlock, A. B.

Birger Johansen, A. B.
Axel Jonsson, A. B.
John Lahtimer, A. B.
Fritz Shilling, A. B.
Dewey W. Davis, Radio
S. J. Ryan, Mess.
C. Garfield, Mess.
Wm. H. Crawford, Ch. Eng.
John Burton Hughes, 1st E.
W. S. Austin, 2nd E.
N. E. Austin, Elec.
W. Owens, Oiler
A. Hobson, Oiler
W. Ward, Oiler
Charles N. Smith, Wiper
H. D. Wright, Std.
Robert Doigle, 1st C.
John Lopez, 2nd C.
William Ovid, Mess.
L. A. Carter, 3rd E.

March 16, 1921.

J. & R. Wilson, Inc.:

On the above order, I agree to withhold from any payment that may be made me for subsistence of crew and to pay you on approved bills (by Mr. Spencer and Mr. Crawford) the amount that may be due you for provisions so furnished.

IRA S. LILLICK,
Attorney for Above-named Crew.

[Endorsed]: No. 3749. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 9, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 3749.

ANGLO-CALIFORNIA TRUST COMPANY, a
Corporation,

Appellant,

vs.

RICHARD J. SPENCER et al.,

Appellees.

W. E. GERBER, Jr.,

Appellant,

vs.

RICHARD J. SPENCER et al.,

Appellees.

Designation of Appellant of Exhibits to be Printed.

To the Clerk of the Above-entitled Court:

The appellants above named hereby designate the following exhibits and portions of exhibits as necessary to be printed herein:

1. Of Libelant's Exhibit "A," shipping articles, all but the first page.

2. Of Libelant's Exhibit "D," miscellaneous papers and correspondence:

(a) Letter to the Honorable Edwin H. Denby, dated April second, 1921, signed ISL:B.

(b) Telegram to Edwin H. Duff, dated 2d March, 1921, signed W. Leslie Comyn.

(c) Agreement dated March 9, 1921, between Pacific Motorship Company and the United States.

(d) Letter to Messrs. W. L. Comyn & Co., dated April 2, 1921, signed Edwin H. Duff.

(e) Telegram to Edwin H. Duff, dated March 17th, 1921, signed Pacific Motorship Company.

(f) Letter to Ira S. Lillick, dated 29 March, 1921, signed C. G. Mayo.

(g) Telegram to Edwin H. Duff, dated April 1st, 1921, signed W. L. Comyn & Co., Inc.

(h) Telegram to W. L. Comyn & Co., dated April 1st, 1921, signed E. H. Duff.

(i) Letter to Edwin H. Duff, dated April 13th, 1921, signed WLC/H.

(j) Letter to the members of the crew, dated April 1, 1921, signed Drew Chidester.

It is respectfully requested that said documents be included in the printed record.

Dated August 30th, 1921.

PILLSBURY, MADISON & SUTRO,

Proctors for Appellants.

[Endorsed]: No. 3749. In the United States Circuit Court of Appeals for the Ninth Circuit. Anglo-California Trust Company, a Corporation, Appellant, vs. Richard J. Spencer et al., Appellees. W. E. Gerber, Jr., Appellant, vs. Richard J. Spencer et al., Appellees. Designation of Appellants' Exhibits to be Printed. Filed Aug. 30, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Receipt of copy of the within Designation of Exhibits to be printed is hereby admitted this 30th day of August, 1921.

IRA S. LILLICK,
Attorney for Libellant.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

ANGLO-CALIFORNIA TRUST COMPANY, a
Corporation,

Appellant,

vs.

RICHARD J. SPENCER et al.,

Appellees,

W. E. GERBER, Jr.,

Appellant,

vs.

RICHARD J. SPENCER et al.,

Appellees.

Designation of Appellees of Exhibits to be Printed.

To the Clerk of the Above-entitled Court:

The appellees above named hereby designate the following exhibits and portions of exhibits as necessary to be printed herein: The remaining portions of the shipping articles not designated by appellant as necessary to be printed.

2. All Libellant's Exhibit "B," all of the miscellaneous papers and correspondence not designated by appellant.

3. All of the exhibits introduced in evidence, save and except the log-books, which were marked Libellant's Exhibit "B," "C-1" and "C-2."

It is respectfully requested that said documents be included in the printed record, in addition to

these documents and portions of documents heretofore designated by appellant.

Dated September 3d, 1921.

IRA S. LILLICK,
Proctor for Appellees.

[Endorsed]: No. 3749. In the United States Circuit Court of Appeals for the Ninth Circuit. Anglo-California Trust Company, a Corporation, Appellant, vs. Richard J. Spencer et al., Appellees. W. E. Gerber, Jr., Appellant, vs. Richard J. Spencer et al., Appellees. Designation of Appellees of Exhibits to be Printed. Filed Sep. 3, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Received copy this 3d day of Sept., 1921.

PILLSBURY, MADISON & SUTRO,
Proctors for Appellant.

